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The Footprint of the Chinese Petro-Dragon: The Future of Investment Law in Transboundary Resources

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The Footprint of the Chinese Petro-Dragon: The Future of Investment Law in Transboundary Resources

Guillermo J. Garcia Sanchez*

Chinese offshore investments in the oil and gas sector around the world are on the rise. Like dragons roaming the seas trying to dominate the tides, Chinese state-owned companies are particularly eager to bid for oil fields in maritime borderlines. This Article tells the story of how Chinese state-owned companies are overpaying for oil on the US-Mexico boundary to gather experience on how China's global competitors handle resource development conflicts. My argument is that Chinese participation in transboundary field development fits within a long-term strategy to master international legal regimes. The presence of these petro-dragons in borderlines is an example of the use of law as a tool for a rising global power; of an effort to acquire the legal know-how of existing dominant actors to eventually recalibrate it for the benefit of the Chinese people in the South China Sea. From now on, the United States will have to consider the example it is setting for its junior rival in joint resource development zones. Petro-dragons are loose and drilling in the high seas, ready to bring home what they learn from the West. Is the North American region prepared for the challenge?

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I.	INTRODUCTION	

In ancient imperial China, dragons were mythical creatures that symbolized dominant power. Dragons were usually depicted forcefully controlling water, rainfall, and floods.¹ They were the masters of the seas and the emblem of imperial Chinese power represented in the emperor's robes, palaces, and national flags. Today, Chinese national symbols are no longer these mythical creatures, but rather gold stars that represent communism and the people. However, the Chinese state-owned companies' business strategies do resemble the dragons' eagerness to dominate the high seas and their resources. They invest in offshore areas where profits are dubious,² they buy interests in oil fields that are about to decline in production,³ and they bid aggressively for blocks located in borderland areas where two or more states share the property of the resources.⁴ There is nothing irrational with the dragon-

1. *Chinese Dragon*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Chinese_dragon (last visited Dec. 26, 2019).

2. Alexi Mostrous, *China Takes Control of North Sea Oil Drilling*, TIMES (Aug. 23, 2016, 12:01 AM), <https://www.thetimes.co.uk/edition/news/china-takes-control-of-north-sea-drilling-0p77tdqrm>.

3. *Nexen Announces Gulf of Mexico joint Venture Partnership*, NEXEN (Nov. 30, 2011) <https://www.globenewswire.com/news-release/2011/11/30/1362492/0/en/Nexen-Announces-Gulf-of-Mexico-Joint-Venture-Partnership.html>.

4. Jerónimo Mohar, *Oil Auction Brings Some Good News to Mexico, and China Is Eager to Capitalize*, WORLD POL. REV. (Dec. 29, 2016), <https://www.worldpoliticsreview.com/articles/20806/oil-auction-brings-some-good-news-to-mexico-and-china-is-eager-to-capitalize>.

like attitude of the Chinese companies. Rather, it is a well-conceived strategy to secure resources for mainland China and, as I argue in this Article, to reshape the architecture of oil and gas operations around the world for the benefit of Chinese interests.

This Article tells the story of the rise of the Chinese dragon in transboundary field development and how Mexico and the United States have slowly opened the door for these dragons to roam the Gulf of Mexico. How and why was the door left open? It all started in 2012 when the United States and Mexico signed an international treaty for the safe and efficient exploitation of transboundary hydrocarbon resources in the Gulf of Mexico (2012 Treaty).⁵ As part of the 2012 Treaty, both nations pledged to enact common safety and environmental standards applicable to the maritime border, to design a model unitization agreement that is to be negotiated by the hydrocarbon field operators on each side of the border, and to approve the final unitization agreement proposed by the operators.⁶ It has been five years since the 2012 Treaty entered into force, and Mexico and the United States have still not come up with the required standards and draft contracts.⁷ However, this inaction has not stopped both governments from leasing blocks at the border, despite the lack of clear and agreed-upon standards.⁸ One actor in particular has been very active in trying to establish its presence in, and even full control of, the fields located in the U.S.-Mexico maritime border: the China National Offshore Oil Corporation (CNOOC).⁹

This state-owned “dragon” bid aggressively in the last two deepwater auctions on the Mexican side and has been active on the U.S. side of the border as well.¹⁰ In recent years, the Chinese acquired the

5. Agreement Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, U.S.-Mex., Feb. 20, 2012, T.I.A.S. No. 14-0718 [hereinafter 2012 Treaty]; Guillermo J. Garcia Sanchez & Richard J. McLaughlin, *The 2012 Agreement on the Exploitation of Transboundary Hydrocarbon Resources in the Gulf of Mexico: Confirmation of the Rule or Emergence of a New Practice?*, 37 HOUS. J. INT'L L. 681, 745-46 (2015).

6. 2012 Treaty, *supra* note 5, art. 19; Sanchez & McLaughlin, *supra* note 5, at 770-71.

7. See *Treaties*, BUREAU OCEAN ENERGY MGMT., <https://www.boem.gov/Treaties/> (last visited Dec. 26, 2019) (explaining both governments' actions after signing the 2012 Treaty).

8. Mohar, *supra* note 4.

9. *Id.*

10. In Round 1.4 CNOOC was the winning bidder for Area 1 located in the Perdido Belt, just 6.5km from U.S. territory, offering the Mexican government an additional royalty of 17.01%. *Mexico's Deepwater Round Ends in Success*, OFFSHORE ENGINEER (Dec. 5, 2016), <https://www.oedigital.com/news/447774-mexico-s-deepwater-round-ends-in-success>. The only other bidder, out of fourteen international companies that participated, offered only a 6.65%

Canadian company Nexen, which is currently jointly developing three offshore fields on the Louisiana coast.¹¹ CNOOC is also a partner of the Norwegian state-owned company Statoil (now known as Equinor) in four deepwater fields in the Gulf.¹² One of them, Logan-1, is located right across the maritime border with Mexico.¹³ The presence of CNOOC at the borderline fields presents challenges for Mexico and the United States. As they codevelop the regulation and model contracts for the Gulf of Mexico, they have to be conscious that China will have a front seat to the type of regulation coming out of their negotiations.

CNOOC's presence at the border is of particular interest since China is embedded in an international territorial dispute over the South China Sea and its deepwater transboundary resources.¹⁴ The way the United States and Mexico engage (but most importantly, the way the United States engages with its southern counterpart) will impact how the Chinese will design their policies toward their neighbors in the South China Sea. In other words, U.S.-Mexico practice will set a precedent under international law and binational custom regarding the way common pool resources are exploited in deepwater fields.¹⁵

Many have written about the expansion of Chinese influence in international legal regimes.¹⁶ Even though there might be a

additional royalty. *Id.* In Round 2.4 the same company came close to obtaining a second field located at the border, Area 2, but lost against an association between Shell and PEMEX that offered only 3.57% more than CNOOC. Nicolas Borda et al., *Mexico: Bid Round 2.4 Results*, HAYNES BOONE (Feb. 1, 2018), https://www.haynesboone.com/-/media/files/alert-pdfs/2018/mexico_bid_round_24_C31048CC1498BDD5A647139.

11. Jameson Berkow, 'A Parade of Broken Promises': How CNOOC Stumbled with Its Nexen Takeover, BNN BLOOMBERG (Sept. 15, 2017), <https://www.bnn.ca/a-parade-of-broken-promises-how-cnooc-stumbled-with-its-nexen-takeover-1.857533>.

12. Cyrus Sanati, *Statoil Sells U.S. Oil Interest to Chinese Company*, N.Y. TIMES (Nov. 4, 2009), <https://dealbook.nytimes.com/2009/11/04/statoil-sells-us-oil-interest-to-chinese-company/>.

13. *See GoM: Statoil Sells Licence Interests to CNOOC*, ENERGY-PEDIA NEWS (Nov. 5, 2009), <https://www.energy-pedia.com/news/gulf-of-mexico/statoil-sells-licence-interests-to-cnooc>.

14. *See generally* Bernard Oxman, *The South China Sea Arbitration Award* (Univ. of Miami Legal Studies Research Paper No. 16-41, Aug. 29, 2016), <https://www.ssrn.com/abstract=2835534> (explaining award in South China Sea arbitration between China and the Philippines).

15. Sanchez & McLaughlin, *supra* note 5, at 686-87.

16. *See generally* MATTHIEU BURNAY, CHINESE PERSPECTIVES ON THE INTERNATIONAL RULE OF LAW: LAW AND POLITICS IN THE ONE-PARTY STATE (Jan Wouters ed., 2018) (discussing the development of China's views on the international rule of law); NOAH FELDMAN, COOL WAR: THE FUTURE OF GLOBAL COMPETITION (1st ed. 2013) (examining the future of international regimes in light of U.S.-Chinese relations); HENRY KISSINGER, ON

disagreement about whether the Chinese clout is a threat to Western values or rather a reinforcement of the existing regime, there is no doubt among scholars that Beijing is playing a long game to influence existing institutions to the advantage of the Chinese people.¹⁷ This Article contributes to the current literature on the topic by adding the influence of Chinese investments in the oil and gas sector. It tells the story of the strategic moves made by China to help define transboundary hydrocarbon legal regimes around the world. As such, this Article uses as an example the elements of the 2012 Treaty between the United States and Mexico that I believe are precedent-setting for China on how to deal with transboundary hydrocarbon resources. Beijing and Washington are in a similar bargaining position with their neighbors.¹⁸ They both have the military and economic power to

CHINA (2011) (offering a diplomat's perspective on China's international development both past and future); CHING KWAN LEE, *THE SPECTER OF GLOBAL CHINA: POLITICS, LABOR, AND FOREIGN INVESTMENT IN AFRICA* (2017) (examining China's international investments in African nations); Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT'L ECON. L. 457 (2009) (discussing future impact of a U.S.-China BIT on international regimes); Diane A. Desierto, *Rewriting the New "Great Game": China, the United States, and their International Public Lawyers*, 1 PEKING U. TRANSNAT'L L. REV. 351 (2013) (explaining the role of Chinese legal scholars and lawyers in postmodern international law); Julian Ku, *China and the Future of International Adjudication*, 27 MD. J. INT'L L. 154 (2012) (discussing China's growing participation in international dispute resolution tribunals); Joshua Kurlantzick, *China's New Diplomacy and Its Impact on the World*, 14 BROWN J. WORLD AFF. 221 (2007) (analyzing the influence of China's expanded international policies); Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1 (2006) (imagining the application of international law to China's growing role in geopolitics); Gregory Shaffer & Henry Gao, *A New Chinese Economic Law Order?* (Univ. of Cal. Irvine Sch. of Law Research Paper No. 2019-21, Apr. 11, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3370452 [hereinafter Shaffer & Gao 2019]; Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 266 (2016) (analyzing the WTO's effectiveness in light of China's unique and growing economic structure); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 904 (2006) (discussing the impact of China's WTO membership and differing intellectual property ideology on international trade); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000) (examining the past and future of American intellectual property foreign policy in light of China's rise); Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY LAW 2 (2007) (discussing the role of China's expanded intellectual property regime in its global economic development); Kerry Brown, *China's Exceptionalism Rewrites the Western Political Playbook*, ECONOMIST (June 13, 2018), <https://www.economist.com/open-future/2018/06/13/chinas-exceptionalism-rewrites-the-western-political-playbook>.

17. See Ku, *supra* note 16, at 155.

18. KISSINGER, *supra* note 16, at 487 ("[T]he United States and China perceived that they needed each other because both were too large to be dominated, too special to be transformed, and too necessary to each other to be able to afford isolation.").

leverage the negotiation with neighboring states in their favor.¹⁹ Moreover, they both have strategic geopolitical reasons to advance the development of oil fields in their territorial seas.

Part II of this Article describes how the expansion of Chinese influence in the development of international oil and gas law fits under its broader strategy to emulate U.S. dominance in international legal institutions.²⁰ It highlights the rise of Chinese investments in foreign offshore drilling operations and the significance of its geopolitical role. Part III analyzes how the strategies employed by China to participate in the international legal regime on transboundary resources fits under its emulation strategy. It explores the use of China's state-owned companies as proxies of the Chinese government to participate in deepwater field auctions, to be part of the negotiation of unitization agreements, and to take a front-seat role in the development of transboundary fields. Part IV then describes the precedent-setting elements of the 2012 Treaty that deviate from customary international law and closes by highlighting the red flags inherent with Mexico and the United States enacting new regulations implementing the 2012 Treaty with loose "dragons" swimming in the Gulf.

II. DRAGONS EMULATING THE AMERICAN EAGLE

In the eighteenth century, Adam Smith wrote that "[t]he love of our own nation . . . often disposes us to view, with the most malignant jealousy and envy, the prosperity and aggrandisement of any other neighbouring nation."²¹ Under this view, states that are in direct competition with each other are threatened by the development of their peers. In Smith's view, international commerce deepens the "anxiety about national security."²² The only way to break the vicious security cycle is through "national emulation."²³

National emulation is a process in which the anxiety is diminished by admiring the "excellence of others" and initiating a race to supplant the competitor instead of grieving their existence.²⁴ Global power

19. *Id.* at 491.

20. Shaffer & Gao 2019, *supra* note 16, at 1-2.

21. ISTVAN HONT, JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE 115 (2005) (quoting ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 269 (Knud Haakonssen ed., 2004)).

22. *Id.*

23. *Id.* at 115-16.

24. *Id.* at 117 (quoting SMITH, *supra* note 21, at 133).

dynamics have drastically changed since the end of the Cold War.²⁵ Today, China is increasing its influence and challenging Western domination over international legal structures.²⁶ That is, China seeks to set the rules of the game in international politics,²⁷ a role that historically belonged to the United States and Western democracies.²⁸ This rise in leadership is driven partly by the vacuum left by the decline of U.S. influence in rulemaking authority—which was not taken up by global institutions, as expected by liberal scholars—on which rising economic and military powers, such as China, capitalized.²⁹ The Chinese effort to fill the vacuum has become clearer after the swearing in of President Donald Trump and the encroachment of power of President Xi Jinping, who casts himself as the leader of the rule-based international trading system.³⁰

However, the process of Chinese domination over the enactment of new international rules did not happen overnight. China first learned to play with the standards set up by Western democracies in legal regimes, such as the World Trade Organization (WTO) and Bilateral Investment Treaties (BITs), and then began to modify them through

25. See generally William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L.J. 1 (2015) (noting that the rise of Brazil, India, and China has had a profound change on global politics); Posner & Yoo, *supra* note 16 (analyzing China's growing role in geopolitics).

26. FELDMAN, *supra* note 16, at 16; Wu, *supra* note 16, at 262-64; Peter S. Goodman, *In Era of Trump, China's President Champions Economic Globalization*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/business/dealbook/world-economic-forum-davos-china-xi-globalization.html>; Eswar Prasad, *How China Aims to Limit the West's Global Influence*, N.Y. TIMES (Sept. 1, 2017), <https://www.nytimes.com/2017/09/01/opinion/china-west-democracy.html>.

27. DANIEL YERGIN, *THE QUEST: ENERGY, SECURITY, AND THE REMAKING OF THE MODERN WORLD* 205 (2011); Kurlantzick, *supra* note 16, at 222; see KISSINGER, *supra* note 16; Posner & Yoo, *supra* note 16; Brock Tessman & Wojtek Wolfe, *Great Powers and Strategic Hedging: The Case of Chinese Energy Security Strategy*, 13 INT'L STUD. REV. 214 (2011).

28. Goodman, *supra* note 26; Prasad, *supra* note 26; see JONATHAN E. HILLMAN, CTR. FOR STRATEGIC & INT'L STUDIES, *INFLUENCE AND INFRASTRUCTURE: THE STRATEGIC STAKES OF FOREIGN PROJECTS* (Jan. 2019), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/190123_Hillman_InfluenceandInfrastructure_WEB_v3.pdf; KISSINGER, *supra* note 16, at 503; Kurlantzick, *supra* note 16.

29. Burke-White, *supra* note 25, at 2.

30. See Goodman, *supra* note 26.

practice, litigation, and negotiation.³¹ The area of international oil and gas contracts is in line with this expansion of Chinese influence.³²

This Article tells one part of this broader story about geopolitics and international law. It tells the story of how China, through its state-owned companies, has been expanding its influence in offshore drilling areas.³³ As this Part will explain, the Chinese-controlled companies are learning how to drill, operate, and develop fields in the most dangerous and sophisticated parts of the ocean.³⁴ Moreover, they are learning how to negotiate, draft, and design contracts to exploit resources located in the borderlands of other nations.³⁵ They are learning how to navigate the different legal layers involving transboundary hydrocarbon reservoirs, especially the practice by which developed states create customary norms for exploitation of joint fields with their neighbors.³⁶

The Chinese state-owned companies are gaining this expertise even in places where other international companies find it economically unfeasible.³⁷ For CNOOC, investing in areas with low

31. Ku, *supra* note 16, at 156, 164; Posner & Yoo, *supra* note 16, at 13; Shaffer & Gao 2019, *supra* note 16, at 1-2; Manik V. Suri, *Conceptualizing China Within the Kantian Peace*, 54 HARV. INT'L L.J. 219, 249-51 (2013); Wu, *supra* note 16, at 262-64; see FELDMAN, *supra* note 16; Burke-White, *supra* note 25; Desierto, *supra* note 16. Another area where China is emulating the West is the internationalization of its currency. See Weitseng Chen, *Size Matters? Renminbi Internationalization and the Beijing Consensus*, in THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 144, 144-45 (Weitseng Chen ed., 2017) (“‘Currency War,’ a best seller in China that Chinese leaders have reportedly read, engages in a conspiracy theory depicting how the United States and its investment banks made the US dollar the international reserve currency. Commentators have therefore established that currency internationalization requires strong state action at a critical juncture. . . . The long-term goal of the RMB internationalization scheme (the ‘Scheme’) is to make the Chinese yuan an international settlement, investment, and reserve currency.”).

32. Xiaojie Xu, Chinese NOCs’ Overseas Strategies: Background, Comparison and Remarks 3-4 (Mar. 2007) (unpublished paper) (on file with James A. Baker III Institute of Public Policy Rice University), bakerinstitute.org/media/files/page/94235e0c/noc_chinese_nocs_xu.pdf.

33. YERGIN, *supra* note 27, at 204-07.

34. *See id.*

35. *See* Nat’l Hydrocarbons Comm’n & China Offshore Oil Corp. E&P Mex., *Contrato para la Exploración y Extracción de Hidrocarburos Bajo la Modalidad de Licencia en Aguas Profundas*, Contrato No. CNH-R01-L04-A1.CPP/2016 (Mar. 10, 2017) [hereinafter CNOOC-Mexico Contract].

36. *See, e.g.,* Xu, *supra* note 32, at 11 (noting CNOOC has closely cooperated with international partners).

37. ERICA STRECKER DOWNS, CHINA’S QUEST FOR ENERGY SECURITY 15-17 (2000); YERGIN, *supra* note 27, at 206; ERICA DOWNS, COLUMBIA SIPA CTR. ON GLOB. ENERGY POLICY, THE RISE OF CHINA’S INDEPENDENT REFINERIES 16-17 (Sept. 2017), <https://energy.policy.columbia.edu/sites/default/files/CGEPTheRiseofChinasIndependentRefineries917.pdf>; JULIE JIANG & JONATHAN SINTON, INT’L ENERGY AGENCY, IEA ENERGY PAPERS 2011/3,

economic returns is not only a financial transaction, but also an investment in the creation of skills that will allow them to push the boundaries of international petroleum contracts and related treaties when the appropriate time comes.³⁸ Critics have called this type of investment a strategy for “domination of energy markets and of the Western Pacific.”³⁹ As with many things, the Chinese are playing a long-term game, even if they lose some profitability in the short-term.⁴⁰

A key component of any oil and gas investment abroad is the protection afforded by investment treaties.⁴¹ The following subpart analyzes how the Beijing government is emulating U.S. policy to expand protection of foreign investment now that the Chinese state-owned companies have become important exporters of capital in the oil and gas sector.

A. *Emulating and Recalibrating the Investment Regime*

The U.S. BITs after the Cold War were signed with clear objectives. On one hand, the goal was to protect U.S. and European investors abroad through a “stable legal framework.”⁴² The United States felt that it was up to the importers of capital, mainly developing countries, to adapt their legal frameworks in exchange for American foreign direct investment. On the other hand, the treaties gave the investors their own dispute resolution mechanism to insulate the U.S. government from becoming involved in diplomatic protection issues.⁴³ The question on how the system would affect the flow of foreign investment into the United States was not an objective in the design of the regime. In the words of José Alvarez, who negotiated some of the

OVERSEAS INVESTMENTS BY CHINESE NATIONAL OIL COMPANIES 9 (Feb. 2011), <https://www.oecd-ilibrary.org/docserver/5kgglrwdrvvd-en.pdf?expires=1574444237&id=id&accname=guest&checksum=792AF56E94DF02CC8983A33B1B036476>; Erica S. Downs, *The Chinese Energy Security Debate*, 2004 CHINA Q. 21, 25, 33 (2004); Erica Downs, *China's Oil Investment Is Not a Threat*, FOREIGN POL'Y (Oct. 10, 2012, 8:49 PM), <https://foreignpolicy.com/2012/10/10/Chinas-oil-investment-is-not-a-threat/>.

38. YERGIN, *supra* note 27, at 204-08; JIANG & SINTON, *supra* note 37, at 9-23.

39. YERGIN, *supra* note 27, at 205 (quoting *National Security Implications of the Possible Merger of the China National Off-Shore Oil Corporation (CNOOC) with UNOCAL Corporation: Hearing Before the H. Comm. on Armed Services*, 109th Cong. 6 (2005) [hereinafter *UNOCAL Hearing*] (statement of R. James Woolsey, Vice President, Booz Allen Hamilton)).

40. *See id.* at 204-07.

41. Guillermo J. Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law: A Critical Approach*, 57 HARV. INT'L L.J. 475, 483 (2016).

42. J.E. Alvarez, *The Evolving BIT*, 7 TRANSNAT'L DISP. MGMT. 1, 3 (2010).

43. *Id.*

BITs at that time, “the treaty’s references to ‘reciprocal’ investment flows was something of a fraud.”⁴⁴ Few at that time thought that the United States needed to change its own legislation, or that it could eventually become a respondent in an investment claim.⁴⁵

In the same vein, the U.S. model BIT reflected the American view of how the international economy should look in a post-Cold War scenario:

The United States sold its BIT in this period as an essential (but minimal) building block to a free market economy and to the construction of the rule of law. Signing a U.S. BIT, we said, would send a signal that a country had accepted the basic premises of liberal economic theory
⁴⁶

This imposition of an exporting capital country upon the capital-seeking developing nation was adopted and replicated by most of Western nations.⁴⁷ In the 1980s and 1990s, the U.S. model BIT became the baseline for the new BITs signed around the world.⁴⁸ The United States was becoming the hegemon imposing its vision on how the market should be regulated, or unregulated, and on the role that international law played in it.⁴⁹ At least in the discourse, the other economic and political models had failed.⁵⁰ Socialism and import substitution economies were seen as examples of failed policies.⁵¹ The United States was leading the dialogue by using a discourse on “efficien[cy],” “market failures,” and insulation of investments from the threat of national politics in the developing world; everyone else was echoing behind.⁵²

The only exception to this policy was the North American Free Trade Agreement (NAFTA), where Canada was a signing party. As

44. *Id.*

45. *Id.*

46. *Id.* at 5.

47. *Id.*

48. *Id.* (“[M]any modeled closely on the U.S. model—as a perfect storm inspired by the victory of the Capitalist West over what was then its only rivals: failed import substitution schemes or planned economies under socialist and communist regimes.”).

49. *Id.* at 5-6.

50. *Id.* at 6.

51. For a discussion of the development of modern Western economic and legal models, see David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006); David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra*.

52. Alvarez, *supra* note 42, at 5-6.

opposed to all the other U.S. BIT partners, Canada was a significant exporter of foreign investment into the United States. This fact, years later, placed the United States in an exceptional situation. Instead of only reacting to the interpretation of the norms that affected developing countries in their struggle to attract foreign investment, the United States became a target of litigation from Canadian investors.⁵³ By 2018, the United States was the only significant capital exporter that had been sued twenty-one times in investment tribunals.⁵⁴ The vast majority of those cases involved governmental actions taken against Canadian companies; however, there are also cases concerning Uruguayan,⁵⁵ Panamanian,⁵⁶ and Peruvian investments.⁵⁷ The type of cases varied: from challenging legislation enacted by the local government in California, to the jury system in Mississippi, the United States was accused of violating the articles that were initially intended to protect U.S. investors alone.⁵⁸ This participation has allowed the United States to experience firsthand the power of the tribunals.

The unexpected experience had an impact on the United States' view of the regime. On one hand, the United States disliked the broad interpretations that arbitral tribunals were having in cases where the United States was involved; on the other, the treaty constructions from

53. See, e.g., *ADF Grp. Inc. v. United States of Am.*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), <https://2009-2017.state.gov/documents/organization/233043.pdf> (entering an award in the dispute filed by a Canadian investor arising from construction work in the United States); *Apotex Holdings Inc. v. United States of Am.*, ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014), <https://2009-2017.state.gov/documents/organization/233043.pdf> (issuing an award in the Canadian investor Apotex's NAFTA complaint against the United States); *Glamis Gold, Ltd. v. United States of Am.*, Award (June 8, 2009), <https://2009-2017.state.gov/documents/organization/125798.pdf> (evaluating a dispute between the United States and the Canadian company Glamis Gold pursuant to a mining venture in California). See generally *Cases Filed Against the United States of America*, U.S. DEP'T STATE, <https://2009-2017.state.gov/s/l/c3741.htm> (last updated Jan. 20, 2017) (cataloguing cases filed against the United States).

54. Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?*, 19 J. WORLD INV. & TRADE 475, 481 (2018).

55. See *Italba Corp. v. Oriental Republic of Uru.*, ICSID Case No. ARB/16/19, Award (Mar. 22, 2019), italaw.com/sites/default/files/case-documents/italaw10439.pdf.

56. See *Renco Grp. Inc. v. Republic of Peru*, UNCT/13/1, Final Award (Nov. 9, 2016), italaw.com/sites/default/files/case-documents/italaw7744_1.pdf.

57. See *Transglob. Green Energy, LLC v. Republic of Pan.*, ICSID Case No. ARB/13/28, Award (June 2, 2016), italaw.com/sites/default/files/case-documents/italaw7336.pdf.

58. *Loewen Grp., Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, at 2-3 (June 26, 2003), italaw.com/sites/default/files/case-documents/ita0470.pdf; *Methanex Corp. v. United States*, UNCITRAL (NAFTA), Final Award, at 1 (Aug. 3, 2005), italaw.com/sites/default/files/case-documents/ita0529.pdf; Alvarez, *supra* note 42, at 8.

other tribunals, particularly the ones connected to the Argentinean crisis, were signaling that the open texture of the treaty was being interpreted against state actions in times of crisis.⁵⁹ Nevertheless, the United States did not decide to abandon the regime; rather, it decided to recalibrate it.⁶⁰ It did so in two separate ways: (1) by signaling to the tribunals its concern about the NAFTA Joint Commission's interpretations and (2) by reforming its model BIT in 2004 to include more specific principles, removing some of the open text left in the first model.⁶¹ According to Alvarez, "Apart from restricting the scope of what once were far more open-ended investor protections, the new 2004 Model further restricts the discretion of arbitrators charged with deciding investor-state disputes."⁶²

The U.S. model BIT went from being a straitjacket on states to avoid market interventions to a treaty that respects the right of "sovereigns" to respond to market failures.⁶³ The latest iteration of the U.S. reluctance to use investment tribunals to protect foreign investment can be seen in the Trump Administration's position in the renegotiation of NAFTA. In the blunt words of the U.S. Trade Representative Robert Lighthizer:

I've had people come in and say, literally, to me: 'Oh, but you can't do this: you can't change ISDS. . . . You can't do that because we wouldn't have made the investment otherwise.' I'm thinking, 'Well, then why is it a good policy of the United States government to encourage investment in Mexico?' . . . The bottom line is, business says 'We want to make decisions and have markets decide. But! We would like to have political risk insurance paid for by the United States' government.' And to me that's absurd. You either are in the market, or you're not in the market.⁶⁴

59. Alvarez, *supra* note 42, at 8-9.

60. *See id.* at 9.

61. Alvarez, *supra* note 42, at 8-9; *see also* CAMPBELL McLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 22-23 (Loukas Mistelis ed., 2007) (noting the 2004 U.S. Model BIT incorporated provisions reflecting the public interest of states); *North American Free Trade Agreement: Notes of Interpretation of Certain Chapter 11 Provisions*, GLOBAL AFF. CAN. (July 31, 2001), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disdiff/NAFTA-Interpr.aspx?lang=eng> [hereinafter *FTC Notes of Interpretation*] (clarifying terms of NAFTA provisions).

62. Alvarez, *supra* note 42, at 10.

63. *Id.* at 12-14.

64. Phil Levy, *Critique of NAFTA Provision Highlights Team Trump's Misconceptions on Investment Abroad*, FORBES (Oct. 23, 2017), <https://www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico/#4e9fe2e27064>; *see also* Janyce McGregor, *Why NAFTA's Unloved Investor-State Dispute Chapter May Be in Trouble*, CBC NEWS (Sept. 8, 2018), <https://www.cbc.ca/news/politics/nafta-isds-weekend->

At the same time that the United States is recalibrating its role in the investment regime, the rise of China as a significant capital exporter shows signs that it is willing to emulate the policies implemented by the United States in the past.⁶⁵ For many years, Beijing was reluctant to sign BITs.⁶⁶ The central government believed that these international treaties were instruments of colonialism that referred to customary law where the developing world, and particularly China, had not had the chance to participate in the creation of the regime.⁶⁷ In the past fifteen years, this view has changed. As Chinese capital is invested around the developed and developing world, China has been more inclined to adopt the rules of investment treaties as its own and to emulate the U.S. policy on investment.⁶⁸ The mere fact that it has now become the second largest BIT-signer proves this new policy.⁶⁹

1. The Recognition of Investment Tribunals as a Dispute Resolution Mechanism

The first change in Chinese perception toward BITs can be found in the consent of the state to submit the disputes arising from the treaty to international arbitration.⁷⁰ Before becoming a significant capital exporter, most Chinese BITs limited the dispute resolution mechanism available to investors to national courts.⁷¹ The foreign investor could only bring a claim to an arbitration tribunal to determine the amount of compensation for expropriation.⁷² The exact text in the treaties stated that foreign investors could only bring claims “*to the competent court of the Contracting Party accepting the investment.*”⁷³ From China’s

1.4814141 (detailing ongoing problems between North American States attempting to form a new trade treaty).

65. Shaffer & Gao 2019, *supra* note 16, at 1-2; see LEE, *supra* note 16, at 1-11 (describing how China has expanded its FDI in developing nations).

66. See Guang Hong, Scope of Arbitration in Chinese BITs: Policies & Implications (Nov. 1, 2009) (unpublished J.D. article), https://works.bepress.com/guang_hong/1/.

67. See generally Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 NORDIC J. INT’L L. 335 (2005) (discussing the history of unequal treaties in colonial policy).

68. Alvarez, *supra* note 42, at 10-15; Congyan, *supra* note 16, at 459-61.

69. Hong, *supra* note 66, at 5.

70. *Id.* at 9.

71. *Id.* at 6-8.

72. *Id.*

73. That explains why the Chinese BITs have only been litigated on one occasion. See Ko-Yung Tung & Rafael Cox-Alomar, *The New Generation of China BITs in Light of Tza Yap Shum v. Republic of Peru*, 17 AM. REV. INT’L ARB. 461, 464 (2006); see also Hong, *supra* note 66, at 16 (noting the language of a BIT may determine the jurisprudence of an arbitration tribunal). For a case where a similar clause was reviewed and the investor was forced to bring

perspective, foreign direct investment was an issue strictly related to the capital being imported to the Chinese territory, and in that sense, China “viewed the ability to adjudicate issues arising from these investments as a matter of state sovereignty.”⁷⁴

This policy has changed now that China is a capital exporter.⁷⁵ Today, Chinese companies, mainly state-owned companies, are investing abroad in strategic areas such as mining and hydrocarbons exploitation.⁷⁶ This new capital exporting role has forced the government to review its BITs. For starters, Beijing has considered that submitting Chinese interests to domestic courts is no longer an option.⁷⁷ The government in Beijing now has included the traditional clause that “[a]ny dispute concerning investments” at the request of the investor could be submitted to international arbitration.⁷⁸ In practice, this means that any state’s act that affects Chinese companies, or the foreign capitals in China, under the scope of the treaty could be claimed before an international tribunal without the need to address it first in the national courts.

2. A Second Common Ground: The Fair and Equitable Treatment

An example of emulation that helps us to prove that China is willing to follow the steps of the United States is its approach to the fair and equitable treatment principle (FET principle). Before analyzing the emulation of Chinese policy toward this principle, it is important to understand its evolution in the regime built by the United States.⁷⁹

the claim first to national courts, see *Berschader v. Russia Fed’n (Beg. v. Rus.)*, SCC Case No. 080/2004, Award (Apr. 21, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf.

74. Hong, *supra* note 66, at 20.

75. *Id.* at 21 (“[T]he rising capital of outward FDI from China would eventually steer future Chinese BITs in a new light and incentivize treaties that incorporate a full scope of arbitral dispute resolution.”).

76. Jude Webber, *China Boosts Mexico Ties by Grabbing Blocks in Oil Auction*, FIN. TIMES (Dec. 5, 2006), <https://www.ft.com/content/9982457e-bb31-11e6-8b45-b8b81dd5d808>.

77. Hong, *supra* note 66, at 22 (“Since SOEs are administered by China’s central government, any disputes other than the amount of compensation in an event of expropriation would *directly* impinge upon the economic welfare of the Chinese government. But to make matters worse the institutions that have this power are foreign domestic courts. The idea that domestic courts of a foreign country may one day exercise jurisdiction over China’s SOEs and thus decide the economic interest of the Chinese government must not have been considered when First Generation BITs were drafted.”).

78. *Id.* at 10 (emphasis added) (quoting *Encouragement and Reciprocal Protection of Investments*, China-Ger., art. 9, Dec. 1, 2003, 2362 U.N.T.S. 253).

79. See Alvarez, *supra* note 42.

The U.S. nationals were some of the first to encounter a case where the principle was given substance.⁸⁰ In *Neer v. Mexico*, the tribunal resolved that the “propriety of governmental acts should be put to the test of international standards” and that the “treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful [sic] neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”⁸¹ This standard of government action was later called a “minimum treatment” of aliens under customary international law.⁸² This standard encompassed fair and equitable treatment and full protection and security from governmental intervention.⁸³

The United States then adopted the FET principle in its Friendship and Navigation Treaties,⁸⁴ and in the 1990s, the standard became part of NAFTA’s Chapter XI.⁸⁵ NAFTA’s Article 1105 established that “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”⁸⁶

As cases involving the treatment of foreigners began to be litigated, tribunals interpreted the principle and expanded it according to the challenges faced by modern investments.⁸⁷ For example, some tribunals had to resolve questions on the link between the FET principle of full protection and security and fair and equitable treatment.⁸⁸ Moreover, some tribunals discussed whether the FET principle

80. See General Claims Convention, Mex.-U.S., Sept. 8, 1923, 43 Stat. 1730; *Judicial Decisions Involving Questions of International Law: Neer v. Mexico* (Oct. 15, 1926), 21 AM. J. INT’L L. 555, 555 (1927). The tribunal was constituted according to the General Claims Convention of 1923 that had as its goals to address all the losses and damages inflicted upon citizens of both countries by the U.S. and Mexican Governments.

81. *Judicial Decisions Involving Questions of International Law*, *supra* note 80, at 555-56.

82. Amicus Brief of Nat’l Ass’n Mfrs., at 15, *Eli Lilly & Co. v. Canada*, Case No. UNCT/14/2 (Feb. 12, 2016), italaw.com/sites/default/files/case-documents/italaw7109.pdf.

83. *Id.*

84. See Treaty of Friendship, Commerce and Navigation, Ger.-U.S., Oct. 29, 1954, 7 U.S.T. 1839, 1841.

85. RUDOLPH DOLZER & CRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 152-53 (2008).

86. North American Free Trade Agreement art. 1105(1), Can.-Mex.-U.S., Dec. 17, 1992, 32 ILM 289 [hereinafter NAFTA] (emphasis added).

87. See Amicus Brief of Nat’l Ass’n Mfrs., *supra* note 82, at 15.

88. See *id.*

awarded a higher protection than that afforded to their nationals.⁸⁹ Some tribunals came to the controversial conclusion that the concept encompassed an international right to transparency.⁹⁰ These tribunals also considered that breaches of international law were in and of themselves evidence of unfair treatment to the investors.⁹¹ Such a broad interpretation was not welcomed by the United States and its NAFTA partners. In an effort to recalibrate the broad interpretations, Canada, Mexico, and the United States published a joint declaration stating that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law.”⁹²

89. *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 122 (Oct. 11, 2002), <https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf>; *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, UNCITRAL Case No. UN 3467, Final Award ¶¶ 189-190 (London Ct. of Int'l Arb. July 1, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf>; *Pope & Talbot Inc. v. Can.*, UNCITRAL, Award, ¶ 110 (Apr. 10, 2001), <https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf>; *S.D. Myers, Inc. v. Can.*, UNCITRAL, Partial Award, ¶ 260 (Nov. 13, 2006), https://www.uncitral.org/res/transparency-registry/registry/data/can/s_d_myers_inc_html/myers-32.pdf. For other investment cases where these issues were discussed, see *Case Concerning Elettronica Sicula*, Judgment, 1989 I.C.J. 15 (July 20, 1989); *AES Summit Generation Ltd. v. Republic of Hung.*, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010), <https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf>; *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), <https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf>; *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award (July 24, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf>; *CME Czech Republic B.V. (Neth.) v. Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001), <https://www.italaw.com/cases/documents/282>; *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0206.pdf>; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007), <https://www.italaw.com/cases/401>; *Nobel Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf>; *Parkerings-Compagniet AS v. Republic of Lith.*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf>; *Suez v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010), <https://www.italaw.com/cases/1057>; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), 41 I.L.M. 896 (2002).

90. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 70-88 (Aug. 30, 2000); see *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 406-408 (July 14, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf> (discussing transparency arguments as fair and equitable treatment).

91. *Azurix*, ICSID Case No. ARB/01/12, ¶¶ 406-408; *Metalclad*, ICSID Case No. ARB(AF)/97/1, ¶¶ 70-88; *Pope & Talbot*, UNCITRAL, ¶ 118; *S.D. Myers*, UNCITRAL, ¶¶ 262-264.

92. *FTC Notes of Interpretation*, *supra* note 61, art. 2(2).

The United States even went further with its recalibration and modified its traditional model BIT. The 2004 U.S. model treaty specified the cases that Washington considers a breach of the standard, which were limited to issues related to a denial of justice in criminal, civil, or administrative adjudicatory proceedings.⁹³ The United States also reaffirmed the need to link it to customary international law and due process as interpreted by “the principal legal systems of the world.”⁹⁴

The U.S. reaction was based not only on broad interpretations by NAFTA tribunals but also on cases where the United States was not a party to the arbitration.⁹⁵ An example of this broad interpretation can be found in *Occidental v. Ecuador* where arbitrators were asked to decide whether the fact that the claimants had proved a breach of the protection and discrimination standards implied that a violation of fair and equitable treatment had also taken place.⁹⁶ The U.S. 2004 model BIT clearly rejected this connection and affirmed that a tribunal could not find a breach of the FET principle as a result of other standards being breached.⁹⁷ Such a clear rejection of the broad interpretation of the FET principle forced the new tribunal constituted according to the 2004 U.S. model BIT to find a violation of the treatment without any link to the other investment principles.⁹⁸

The recalibrating phenomenon is a consequence of a continuous construction of “common law” among international investment tribunals.⁹⁹ Tribunals are aware of each other’s interpretations, borrow analogies, and openly employ the same criteria in an effort to strengthen their resolutions.¹⁰⁰ The emergence of a “common law” is

93. 2004 U.S. Model BIT art. 5 [hereinafter U.S. Model BIT], https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

94. *Id.* art. 2(a). For discussions on the U.S. Model BIT, see Alvarez, *supra* note 42; Gilbert Gagné & Jean-Frédéric Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. INT’L ECON. L. 357, 364 (2006); Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. INT’L ARB. 383, 398 (2004); S.M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, 3 TRANSNAT’L DISP. MGMT. 1, 7 (2006).

95. Gagné & Morin, *supra* note 94, at 359.

96. *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, UNCITRAL Case No. UN 3467, Final Award ¶¶ 187.

97. U.S. Model BIT, *supra* note 93, art. 5(3).

98. *Occidental*, UNCITRAL Case No. UN 3467, ¶ 190.

99. CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 163 (Philippe Sands et al. eds., 1st ed. 2007); Cesare P.R. Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 N.Y.U. J. INT’L L. & POL. 755, 765 (2008).

100. BROWN, *supra* note 99; Romano, *supra* note 99, at 765.

not without controversy.¹⁰¹ The fact is, none of the treaties formally establish the use of precedents as part of the arbitral system.¹⁰² Most treaties that create international tribunals are either silent with regard to the use of precedent or explicitly state that the case decision is only binding upon the parties that participated in the proceedings.¹⁰³ Nevertheless, it is an element that influences judicial behavior and that affects the way states view international resolutions.¹⁰⁴ The use of precedents has forced third parties with similar treaties to review these resolutions in the fear that a progressive interpretation might be used against them in similarly fact based cases.¹⁰⁵

For example, China has also been monitoring the development of the FET principle.¹⁰⁶ Now a major exporter of capital, Beijing has closely followed the United States reaction to progressive interpretations and, most importantly, how Washington has recalibrated because of them.¹⁰⁷ Evidence of China's awareness can be found in their latest BITs where it not only included the amendments of the U.S. model BIT, but it also added new substantive concepts created through the tribunals' "common law."¹⁰⁸ In a way, the Chinese model BIT is parallelly evolving with the U.S. model BIT.¹⁰⁹ Both are interested in limiting the expansion of an arbitrator's discretion on what the state's obligations are regarding treating foreign investors in a fair and equitable way.¹¹⁰ As the United States and China seem to reach an implied consensus on the FET principle, other states will follow.¹¹¹ Today "the combined capital flows of these two states alone eclipse those of most other states combined," thus making their views on the future of investment law some of the most influential for all capital exporting states.¹¹²

The evolution of the FET principle is illustrated in the following flow of boxes. The chart shows how each time a tribunal interpreted

101. BROWN, *supra* note 99.

102. BROWN, *supra* note 99; Romano, *supra* note 99, at 764.

103. BROWN, *supra* note 99; Romano, *supra* note 99, at 765.

104. BROWN, *supra* note 99; Romano, *supra* note 99, at 765.

105. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 12 (2011).

106. Alvarez, *supra* note 42, at 11-12.

107. *Id.*

108. *Id.*

109. *Id.* at 15-19; Congyan, *supra* note 16, at 458-59.

110. *FTC Notes of Interpretation*, *supra* note 61; Alvarez, *supra* note 42, at 9-11.

111. Alvarez, *supra* note 42, at 19.

112. *Id.*

the principle, the United States would react by integrating the new interpretation, or by recalibrating through the enactment of new definitions in its BITs. It also shows how China reacted first by following the United States interpretation, but in the latest stage recalibrated the principle to its own advantage.

Neer Case (A tribunal found for the first time that “the treatment of an alien . . . should amount to an outrage, to bad faith, to wilful [sic] neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”)¹¹³



U.S. Incorporation of the Principle

Article 1105 of NAFTA (FET constitutes a part of the minimum treatment of aliens, but it is not tantamount to minimum treatment itself.)¹¹⁴



Metalclad v Mexico Case (The tribunal linked the FET treatment with transparency.)¹¹⁵

S.D. Myers v Canada Case (The tribunal held that host State’s breach of a rule of international law being specifically designed to protect investors will also constitute the breach of FET.)¹¹⁶

Pope & Talbot v Canada Case (The tribunal considered that FET treatment should be interpreted to include the “fairness elements under ordinary standards applied in the NAFTA countries.”)¹¹⁷

113. *Judicial Decisions Involving Questions of International Law: Neer v. Mexico*, *supra* note 80, at 556.

114. NAFTA art. 1105, *supra* note 86.

115. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, (Aug. 30, 2000).

116. *S.D. Myers, Inc. v. Can.*, UNCITRAL, Partial Award (Nov. 13, 2006), https://www.uncitral.org/res/transparency-registry/registry/data/can/s_d_myers_inc_html/myers-32.pdf.

117. *Pope & Talbot Inc. v. Can.*, UNCITRAL, Award, ¶ 118 (Apr. 10, 2001), <https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf>.



U.S. Recalibration of the Principle

NAFTA Commission (“‘[FET]’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law [MST] of aliens.”)¹¹⁸



U.S. Recalibration of the Principle

Article 5(2)(a) and 3 US Model BIT 2004 (“[T]he obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . . [a] determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.”)¹¹⁹

Chinese Emulation of the Principle

Article 143 of the China-New Zealand BIT (2008) (FET “in accordance with commonly accepted rules of international law . . . investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor.”)¹²⁰



118. FTC Notes of Interpretation, *supra* note 61, at 2(2) (emphasis added).

119. 2004 Model BIT, *supra* note 93, at 2(a) and 3 (emphasis added).

120. Free Trade Agreement, China-N.Z., Apr. 7, 2008, 2590 U.N.T.S. 101 art. 143(1)-(2) (emphasis added).

Occidental v. Ecuador Case (“[T]he question of whether in addition there has been a breach of full protection and security under this Article becomes moot as *a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.*”¹²¹ *Suez v. Argentina* case—“[I]t is possible for Argentina to violate its obligation of fair and equitable treatment toward the Claimants without violating its duty of full protection and security. In short, *there are actions that violate fair and equitable treatment that do not violate full protection and security.*”)¹²²



Chinese Recalibration of the Principle

Article 5 Mexico–China BIT (2008) (“[T]reatment in accordance with international law, including fair and equitable treatment and full protection and security. . . For greater certainty, this Article prescribes the international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Contracting Party. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ *do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidence of State practice and opinio juris. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*”)¹²³

The mutual understanding between Beijing and Washington does not leave the tribunals completely powerless. Ultimately, like any other broadly defined legal concepts, tribunals could work through their case

121. *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, UNCITRAL Case No. UN 3467, Final Award ¶ 187 (London Ct. of Int’l Arb. July 1, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf>.

122. *Suez v. Argentine Republic*, ICSID Case No. ARB/03/19, ¶ 171 Decision on Liability (July 30, 2010), <https://www.italaw.com/cases/1057>

123. Agreement on the Promotion and Reciprocal Protection of Investments, China–Mex., July 11, 2008, 2626 U.N.T.S. 3 art. 5 (emphasis added).

law and develop new understandings.¹²⁴ Fair and equitable treatment cases constantly involve the interpretation of broad concepts such as “due process” in accordance with the “principal legal systems of the world.”¹²⁵ Furthermore, international tribunals, when facing common principles, are borrowing definitions from other regimes.¹²⁶ Other courts, such as the Inter-American Court and the European Court of Human Rights, have their own precedents on similar concepts.¹²⁷ Moreover, there is a growing trend of model BITs that foster the connection between human rights regimes and investment principles.¹²⁸ Exporting capital states are now more inclined to accept government action for the protection of the environment, labor rights, human rights, and corporate social responsibility.¹²⁹ For example, the

124. Guilleme, *supra* note 105, at 5.

125. See U.S. Model BIT, *supra* note 93, art. 5(2)(a); see, e.g., Case Concerning Elettronica Sicula, Judgment, 1989 I.C.J. 57 (July 20, 1989) (determining whether the act of requisitioning a plant constituted taking without due process).

126. Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 29-30 (2015).

127. For some of the jurisprudence from the Inter-American Court of Human Rights on the topic, see Castillo Petruzzi v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 41 (Sept. 4, 1998); Gutman v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184 (Aug. 6, 2008); López-Álvarez v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141 (Feb. 1, 2006); Pueblo Bello Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); Ramírez v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 126 (June 20, 2005). Although the European Convention on Human Rights does not mention explicitly the right of “due process,” it does mention in Article 5 that “[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.” Nov. 4, 1950, 213 U.N.T. 221. It then enumerates what the concept entails. From a reading of all the enlisted elements, one can draw the conclusion that they are the different interpretations of the concept of “due process.” Due to the length of this Article, the cases where the European Court of Human Rights has interpreted Article 5 will not be transcribed. For further research on these cases, see *Factsheets*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/pages/home.aspx?p=press/factsheets&c=> (last visited Dec. 26, 2019).

128. Alvarez, *supra* note 42, at 15.

129. The preamble of the Norwegian Model BIT of 2007 reads as follows:

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights; *Desiring* to contribute to a stable framework for investment in order to maximize effective and sustainable utilization of economic resources and improve living standards; *Conscious* that the promotion and reciprocal protection of investments in accordance with this Agreement will stimulate the business initiative; *Emphasising* the importance of corporate social responsibility; *Recognising* that the development of economic and business ties can promote respect for internationally recognized labour rights; *Reaffirming* their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations

Norwegian model BIT preamble includes all these elements as a reflection of the will of the state to invite arbitral tribunals to balance the foreign companies' goals and their impact in developing nations.¹³⁰ Investments are not only defined in these new model BITs as tools for profit but also as instruments that impact social and environmental rights and that should be able to be restrained through social policies.

B. Chinese Investment and Their Geopolitical Role

As mentioned above, the investment regime was created to protect foreign investors.¹³¹ At that time, most investors were private parties, global companies, transnational associations, and multinationals.¹³² Today, the type of foreign investor that is subject to the protection of the regime is being challenged by the role that the Chinese government, and particularly the Communist Party, has in the expansion of Chinese investment abroad.¹³³

The Chinese government has made most of its investments in the United States through the use of state-owned companies and sovereign wealth funds, legal entities that are not expressly addressed in the traditional BITs.¹³⁴ The Chinese government considers both entities as an extension of Party dominance. Chinese financial institutions are "instruments of national economic policy," and the state-owned companies were born "both commercial and communist at the same time."¹³⁵ In the words of Professor Mark Wu, "Alongside the state is the Chinese Communist Party . . . a separate political actor that plays an active role in the management of state-owned enterprises"¹³⁶

under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights.

Norway Model BIT pmbl., regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf (last visited Dec. 26, 2019); see also Alvarez, *supra* note 42, at 15 (discussing Norway's extreme efforts to rebalance the rights of investors and states).

130. Norway Model BIT, *supra* note 129, pmbl.

131. ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 162 (1995).

132. See *id.*

133. Around 80% of the foreign direct investment from China in other countries is being done by state-owned companies. Hong, *supra* note 66, at 21-22. The few "private" Chinese investors that have invested abroad are in some way related to and dependent on the Chinese Communist Party. See RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS 34-70 (1st U.S. ed. 2010).

134. See Mohar, *supra* note 4.

135. MCGREGOR, *supra* note 133, at 52-53.

136. Wu, *supra* note 16, at 265.

Hence, the underlying problem inside China is that it is trying to emulate a commercial system abroad but is also solving a tension “between the traditionalists in the Party on the one side, who want to keep a tight grip on the enterprises, and the increasingly ambitious chief executives of state companies on the other.”¹³⁷ There is an internal struggle in these companies between playing a capitalist game abroad and being controlled by the interests of the Communist Party at home.¹³⁸ Most treaties include fair and equitable treatment, nondiscriminatory and national treatment standards, which entail the United States having to treat these Chinese investors as if they were American investors, making the decisions from the regulatory agencies that forbid Chinese presence in certain sectors invalid under the treaties.¹³⁹

Take, for example, the case of the Chinese sovereign wealth fund that owns most of the U.S. public debt. Today’s BITs have no provision regarding the appropriate treatment of this new form of foreign direct investment.¹⁴⁰ The traditional definition of foreign investors in most BITs allows the possibility of protecting “government-controlled entities as long as they act in a commercial rather than in a governmental capacity.”¹⁴¹ But sovereign wealth funds do not fall entirely under the definition of commercial activities of the state.

In general, these funds are institutions that invest in different areas abroad: they buy shares from banks and companies, they have expanded into the real estate market, and they have invested in hedge funds.¹⁴² Furthermore, many of these sovereign wealth funds have passed from a passive strategy of acquiring portfolio investments as minority shareholders to increasing their control of the companies.¹⁴³ At the moment, the recipients of those funds have decided to regulate those that are “established and managed directly or however controlled by a sovereign state, with multiple investment strategies including the purchase of shares in companies listed in international markets and working in areas considered strategic by the states in which they are

137. MCGREGOR, *supra* note 133, at 53.

138. *Id.* at 49.

139. See Benjamin A. Shobert, *US Inches a BIT Closer to China*, ASIA TIMES (May 5, 2010), http://www.atimes.com/atimes/China_Business/LE05Cb01.html.

140. See DOLZER & SCHREUER, *supra* note 85, at 46.

141. *Id.*

142. Fabio Bassan, *Host States and Sovereign Wealth Funds, Between National Security and International Law*, 21 EUR. BUS. L. REV. 165, 166 (2010).

143. *Id.* at 167.

established.”¹⁴⁴ But regardless of the area of investment or the state control, these funds could still be acting in a commercial capacity.

As the financial crisis in Europe and the United States accentuated in 2009, and as the funds became “market stabilizers,” this new strategy generated the type of “jealousy” that Adam Smith depicted in his time: “The undisguised concern is that a foreign state may take indirect control of (mostly) European or US private companies working in strategic industry sectors.”¹⁴⁵

The conceptual problem with these funds is that their new financial strategies are challenging the traditional understating of what constitutes a private act of the state or a private foreign investor. Even assuming that the sovereign wealth funds do not fall under the scope of the treaty, the fact that these funds can control multinational corporations also challenges the current interpretations of the concept. Most investment tribunals have considered a legal person as a foreign national according to its place of “*incorporation* or the main *seat* of the business.”¹⁴⁶ This reasoning incentivizes companies to restructure their investment planning so that they are protected under a BIT.¹⁴⁷ The states have condemned the treaty shopping practice, but tribunals have reacted to the critique in contradictory terms.¹⁴⁸ Suffice it to say that the majority of the tribunals have considered it valid and have avoided piercing the corporate veil to see who is the ultimate controller of the investment.¹⁴⁹ This inconsistency of the doctrine is exacerbated by the challenge brought to the investment regime of having a sovereign wealth fund investing heavily in a foreign company. A company with such characteristics might be considered as a national of the state where it was incorporated (i.e., Canada for NEXEN), regardless if behind it there is a sovereign wealth fund or a state-owned company (i.e., China’s interests in NEXEN).

The same happens with many Chinese state-owned companies. On one side, they look like capitalist companies seeking rent opportunities abroad, but on the other, they are constrained by the Party’s interests.¹⁵⁰ Even if the veil is pierced, there might be no seeming presence of the state behind it—but in fact, these corporations

144. *Id.* at 171.

145. *Id.* at 167.

146. DOLZER & SCHREUER, *supra* note 85, at 49.

147. *Id.* at 54-55.

148. *Id.*

149. MCLACHLAN, SHORE & WEINIGER, *supra* note 61, at 144-48.

150. MCGREGOR, *supra* note 133, at 49-54.

are limited by Party politics. In the words of a Chinese corporate lawyer: "In corporate law, the boards [of Chinese state companies] can choose to disregard the Party's advice. As a fact of life, they cannot."¹⁵¹

Some members of the U.S. government see the Chinese expansion in investment as a national security issue.¹⁵² For these "jealous" policymakers, the Chinese sovereign wealth fund that owns most of the public debt of a country could jeopardize America's economic security.¹⁵³ This influence on government debt does not mean that it is in the interest of the Chinese to jeopardize the U.S. economy. In the end, investing in the United States is not done merely to threaten the United States; depreciating the debt would be equivalent to burning their own savings just for the sake of affecting the U.S. economy, which happens to be one of its main trading partners.

At the moment, the United States has handled Chinese investment by requiring them to pass administrative approval by the Committee of Foreign Investment in the United States (CFIUS).¹⁵⁴ CFIUS is tasked with reviewing any investment "whenever there were national security implications."¹⁵⁵ One of the most controversial CFIUS interventions took place in 2005 when the CNOOC abandoned its intention to purchase the California-based Unocal after being pressured by CFIUS.¹⁵⁶

The U.S. Congress has not stopped there. It gave more powers to CFIUS. In 2007, it passed the Foreign Investment and National Security Act not only to include a review of foreign acquisitions on strategic national security areas but also to supervise the intervention from sovereign wealth funds in purchases below 10% of the shares, and even in shares that do not involve voting rights.¹⁵⁷ Today, CFIUS may prohibit any transaction "if the infrastructures are strategic and if the transactions are made by parties controlled, even if only indirectly, by foreign states."¹⁵⁸ It is hard to see how this process of review would be allowed under a traditional BIT that includes nondiscrimination, fair and equitable treatment, and full protection and security provisions. If the United States maintains its policy, it would have to amend its model

151. *Id.* at 49.

152. YERGIN, *supra* note 27, at 205.

153. Bassan, *supra* note 142, at 185.

154. *Id.*

155. *Id.*

156. Shobert, *supra* note 139.

157. Bassan, *supra* note 142, at 185.

158. *Id.* at 185-86.

BIT to allow the powers invested in CFIUS or to explicitly exclude certain areas in the United States from Chinese investment. The problem with this policy is that the Chinese would then have the same right to exclude U.S. investment from certain areas and subject them to review from its national agencies, resulting in a backlash from the opening that the United States has been requesting.¹⁵⁹ It would be a setback to the Chinese tendency to open its economy to foreign investment.

The understanding that the United States and China achieve regarding these new actors in foreign investment will modify not only their relationship but also most of the new foreign direct investment in the world. The fact is that many states, particularly the new emerging economies, are using this kind of legal entity to expand their investment abroad.¹⁶⁰ Countries like India, Korea, and Malaysia have aggressively used their reserves to constitute sovereign wealth funds.¹⁶¹ In addressing them, China and the United States will shape the way investment law is going to develop in the following decades.

C. *The Rise of the Petro-Dragon*

In the past two decades, national oil companies (NOCs) have increased their participation in the oil sector dramatically.¹⁶² Of the twenty top oil-producing companies, more than half—fourteen—are NOCs.¹⁶³ Some studies calculate that NOCs control around eighty percent of the proven world reserves.¹⁶⁴ In the case of China, for example, China National Petroleum Corporation (CNPC) has the fourth-largest oil reserves in the world.¹⁶⁵ CNPC operates oil and gas projects in thirty-five countries worldwide and has a workforce of 1,463,700.¹⁶⁶ What makes the Chinese NOCs different from their counterparts is the fact that the Chinese companies have been willing to expand internationally in a very aggressive way. CNPC, China National Petro-Chemical Corporation (Sinopec), and CNOOC do not

159. *Id.* at 187.

160. *Id.* at 185.

161. *Id.* at 165.

162. Xu, *supra* note 32, at 2-4.

163. *Id.* at 3.

164. *Id.*

165. *Id.* at 5.

166. *The World's Biggest Oil and Gas Companies in 2018*, HYDROCARBONS TECH. (June 21, 2018), <https://www.hydrocarbons-technology.com/features/worlds-biggest-oil-gas-companies-2018/>.

stay in their comfort zones (mainly the home states) but have competed with the major players in securing reserves abroad.¹⁶⁷ CNPC's first business adventures in the 1990s were to Peru, Sudan, and Kazakhstan.¹⁶⁸ As stated by other authors, these NOCs are part of a China *Going Abroad* agenda orchestrated by the central government.¹⁶⁹

The rise of the global Petro-Dragon can be explained as a strategy by the Chinese government to secure access to energy resources for an expanding economy with a flat domestic supply.¹⁷⁰ However, the firsthand control of hydrocarbon resources can also be explained as a strategy to modify the existing legal regime and tailor it toward Chinese interests.

The two strategies are not in conflict. Instead, they work in tandem. An international legal and contractual regime that favors the Chinese interests ensures that the flow of resources feeds a thirsty industry¹⁷¹ and expanding middle class in mainland China.¹⁷² Ultimately, this is the same strategy that the Western democracies, especially the industrialized nations, employed to secure the flow of trade, natural resources, and capital that would expand the domestic companies and secure their assets abroad.¹⁷³ As mentioned in the previous subparts, the WTO, BITs, and the ICSID regime all worked in favor of Western global companies at their time of foundation.¹⁷⁴ Now, China is emulating the former exporting capital nations in creating a regime that protects its interests abroad.¹⁷⁵

III. LOOSE DRAGONS IN THE HIGH SEAS

This Part of the Article describes Chinese state-owned companies' strategy of participating in deepwater fields around the globe. As mentioned previously, Chinese investments—through state-owned companies—should not be considered as regular foreign investments.

167. Xu, *supra* note 32, at 3-4.

168. *Id.* at 4.

169. *Id.*

170. *Id.* at 2-3 ("Most analyses of the Chinese quest for overseas energy sources point to the growing substantial gap between the country's booming demand and its flat supply. Indeed, the author believes that this divide is the primary force pushing the country to secure its sustainable oil supply into the future.").

171. *Id.* at 3-4.

172. He Wei, *Growth of Middle Class Means Major Changes for China*, CHINA DAILY, www.chinadaily.com.cn/china/2017-10/02/content_32752727.htm (last updated Oct. 2, 2017).

173. Alvarez, *supra* note 42, at 5-6.

174. Shaffer & Gao 2019, *supra* note 16, at 16.

175. *Id.* at 3.

Chinese investment planning has a long-term horizon, and most importantly, a geopolitical component.¹⁷⁶ It does not matter that the rest of the international oil companies are abandoning certain areas of the world due to the short-term price horizons and declining production rates; the Chinese are investing in those areas because they consider them strategic for their long-term goals.

This Part also describes the operations of Chinese companies in the contested South China Sea, in the North Sea, and in the Gulf of Mexico. It explains how these three areas of investment connect with one geopolitical goal: to acquire the know-how of the industry, to test the international norms on the development of shared resources, and to be at the forefront of contract negotiations dealing with the development of those areas.

A. Dragons in Transboundary Fields: The North Sea and the Cameroon-Nigeria Maritime Boundary

In its effort to acquire a foothold in the U.S. oil and gas industry, discussed in detail in Part II.C above, CNOOC purchased a large Canadian oil and gas company, Nexen.¹⁷⁷ Nexen has recently increased its operations in the North Sea and is now the operator of the Buzzard, Golden Eagle, and Scott platforms.¹⁷⁸ The significant investment of CNOOC makes it the largest producer in the area.¹⁷⁹ This fact in and of itself has raised flags in the business community since the North Sea is considered to be a depleting area of investment.¹⁸⁰ The decrease in oil prices, the development stage of most of the fields, and the dwindling reserves make the North Sea an area where most big international companies are phasing out—with the exception of CNOOC.¹⁸¹

CNOOC, through its Nexen subsidiary, recently received approval from the United Kingdom's Oil and Gas Authority for a second development plan in the United Kingdom's largest producing

176. See Brown, *supra* note 16.

177. Euan Rocha, *CNOOC Closes \$15.1 Billion Acquisition of Canada's Nexen*, REUTERS, Feb. 25, 2013, available at <https://www.reuters.com/article/us-nexen-cnooc/cnooc-closes-15-1-billion-acquisition-of-canadas-nexen-idUSBRE9101A420130225>.

178. Coleman, *supra* note 3; *Operations: UK*, CNOOC INT'L LTD., <https://intl.cnoocltd.com/operations/Europe/uk> (last visited Dec. 26, 2019).

179. Lianna Brinded, *China Has Taken Over Scotland's North Sea Oil Production*, BUS. INSIDER (Aug. 23, 2016), <https://www.businessinsider.com/chinas-cnooc-largest-oil-operator-in-scotlands-north-sea-2016-8>.

180. Mostrous, *supra* note 2.

181. Brinded, *supra* note 179.

oil field, Buzzard.¹⁸² With the second stage of investment, Nexen is planning to avert the steep decline of Buzzard, which was producing around 140,000 barrels a day (b/d) in early 2018, down from peaks of 220,000 b/d.¹⁸³ The second stage is projected to begin production in 2021 and is expected to increase overall reserves by 26.2 million-55.2 million barrels of oil.¹⁸⁴ Nexen's acreage also includes fields in the borderland with Norway that, if found as containing transboundary resources, would trigger the U.K.-Norway Framework Agreement for transboundary resources.¹⁸⁵

Chinese state-owned companies have also invested heavily in the Cameroon-Nigeria borderline. Since 2012, Addax Petroleum, a subsidiary of the Chinese state-owned company Sinopec, acquired a concession right to Block 123 on the Nigerian side of the border.¹⁸⁶ Block 123 is not only the most important asset in Nigeria owned by Addax Petroleum, allowing the company to produce 300 million barrels (mmbbls) in 2014, but it also straddles the borderline with Cameroon.¹⁸⁷

Consistent with the Chinese strategy of participating in transboundary exploitation, in 2012, Addax Petroleum acquired a license from the Cameroonian government to develop Iroko—a field located across the border from Block 123.¹⁸⁸ With the control of blocks on both sides of the maritime borderline, the Chinese state-owned company has a front seat in the negotiations between Cameroon and Nigeria on how to develop transboundary fields. It can propose a unitization agreement, set up environmental and safety standards, and test both of them with the local authorities.

182. Coleman, *supra* note 3.

183. *Id.*

184. *Id.*

185. Peter D. Cameron, *The Rules of Engagement: Developing Cross-Border Petroleum Deposits in the North Sea and the Caribbean*, 55 INT'L & COMP. L.Q. 559, 571-72 (2006); Nexen Inc. Annual Report Pursuant to Section 13(a) or 15(d) of the Securities and Exchange Act of 1934 8 (2012), https://www.sec.gov/Archives/edgar/data/16873/000110465912012059/a12-5169_140f.htm#TableOfContents.

186. See *Addax Petroleum to Complete OML 123 Development*, NAIRAMETRICS (May 27, 2015), <https://nairametrics.com/2015/05/27/addax-petroleum-to-complete-oml-123-development/> (detailing Addax's commitment to Block 123 oil production).

187. *Addax Highlights Production Gains from OML 123*, ENERGY MIX REPORT (May 27, 2015), <https://www.energymixreport.com/addax-highlights-production-gains-from-oml-123/>.

188. See *Cameroon: Addax Petroleum Announces Oil and Gas Discovery at the Padouk-IX Well, Iroko Block, Cameroon*, ENERGY-PEDIA NEWS (Oct. 9, 2012), <https://www.energy-pedia.com/news/cameroon/new-151972>.

B. *Dragons in the South China Sea*

The South China Sea is estimated to contain considerable amounts of hydrocarbon reservoirs.¹⁸⁹ Some Chinese estimates have listed potential oil reservoirs around 213 billion barrels of oil, and the U.S. Geological Survey estimates roughly 266 trillion cubic feet of natural gas.¹⁹⁰

In 2014, CNOOC drilled a section of the maritime contested area with Vietnam, the Chinese State argued that the fields were located within its “sovereign territory.”¹⁹¹ CNOOC’s \$1 billion deepwater drilling rig, Haiyang Shiyu 981 (HYSY 981), “straddled two hydrocarbon blocks . . . that Hanoi had previously demarcated but not yet developed.”¹⁹²

Due to Vietnamese military and U.S. diplomatic pressure, including the deployment of twenty-nine armed Vietnamese vessels and deadly riots against Chinese companies in Vietnam, the rig was removed in 2015, but the Chinese did so arguing that the decision was taken “in accordance with relevant company’s plan” and not due to “external factor[s].”¹⁹³ Since then, HYSY 981 has been deployed again in contested waters in the South China Sea where there is an overlap between the two continental shelves of Vietnam and the Chinese island of Hainan.¹⁹⁴

189. Tim Daiss, *How Oil Drives the South China Sea Conflict*, OILPRICE.COM (Mar. 14, 2018, 4:00 PM), <https://oilprice.com/Energy/Energy-General/How-Oil-Drives-The-South-China-Sea-Conflict.html#>.

190. *Id.*

191. *Id.*; see also Michael Green et al., *Counter-Coercion Series: China-Vietnam Oil Rig Standoff*, ASIA MAR. TRANSPARENCY INITIATIVE (June 12, 2017), <https://amti.csis.org/counter-co-oil-rig-standoff/> (discussing China-Vietnam tensions over CNOOC rig in disputed territory).

192. Green et al., *supra* note 191; Kate Hodal, *Despite Oil Rig Removal, China and Vietnam Row Still Simmers*, GUARDIAN (July 17, 2014), <https://www.theguardian.com/world/2014/jul/17/oil-rig-china-vietnam-row-south-china-sea>.

193. Hodal, *supra* note 192 (quoting Hong Lei, Spokesperson, Chinese Foreign Ministry, Further Remarks Concerning the Withdrawal of the HYSY 981 Drilling Rig (July 16, 2014), https://www.fmprc.gov.cn/mfa-eng/xwfw_665399/s2510_665401?t1175131.shtml); see also Jane Perlez, *Chinese Oil Rig Near Vietnam to Be Moved*, N.Y. TIMES (July 15, 2014), <https://www.nytimes.com/2014/07/16/world/asia/chinese-oil-rig-near-vietnam-to-be-moved.html> (discussing further the HYSY 981 incident).

194. Mike Ives, *Vietnam Objects to Chinese Oil Rig in Disputed Waters*, N.Y. TIMES (Jan. 20, 2016), <https://www.nytimes.com/2016/01/21/world/asia/south-china-sea-vietnam-china.html>.

C. Dragons in the Gulf of Mexico

Since the 2000s, China has continuously attempted to establish a foothold in the Gulf of Mexico.¹⁹⁵ The first effort took place in 2005, when CNOOC tried to buy the U.S. independent company Unocal, which had a substantial interest in fields located in the Gulf of Mexico.¹⁹⁶ Much of its U.S. production was located in the Gulf.¹⁹⁷ In a few words, the Chinese were trying to enter the deepwater fields in U.S. territorial waters.¹⁹⁸ At that time, CNOOC's billion-dollar financial battle to acquire Unocal was seen by some Chinese officials as "disconcerting."¹⁹⁹ It was the first time a Chinese energy-related state-owned company had entered the U.S. market in such an aggressive way.²⁰⁰ In the end, CNOOC's bid to buy Unocal failed—Chevron acquired Unocal for \$17.3 billion—but the effort rang the bells in Washington, D.C.²⁰¹

China's effort to participate in the U.S. energy market was viewed with hostility by law and policymakers.²⁰² CNOOC's bidding of Unocal "became the focus of a firestorm of anti-Chinese sentiment on Capitol Hill that was already supercharged by the contentious hot-button issues of trade, currencies, and jobs."²⁰³ The reaction "showed the intensity, at least in some quarters, of suspicions of China's motives and methods."²⁰⁴ What became evident from this first experience was that "the United States itself was less hospitable to the openness toward foreign investment that it preached to others."²⁰⁵ Moreover, for the

195. YERGIN, *supra* note 27, at 204-05.

196. *Id.*

197. *Id.* at 205 ("Unocal's entire production in the United States amounted to just 1 percent of the total U.S. output. Much of it was in the Gulf of Mexico, in joint ventures with other companies, and the only market for that output was the United States.").

198. *See id.* at 204-05.

199. *Id.* at 204 ("For some in Beijing, a global takeover battle was not only unfamiliar but disconcerting. The price that CNOOC put on the table was greater than the entire cost of the huge Three Gorges Dam project, which had taken decades to build.").

200. *See generally id.* at 205 (noting the United States was inhospitable to the idea of new Chinese investments).

201. YERGIN, *supra* note 27, at 205 ("But in the course of [the] takeover battle, a fiery political controversy erupted in Washington that was out of scale compared with the issues. . . . [I]t was 'like throwing a match into a room filled with gasoline.'").

202. *Id.*

203. *Id.*

204. *Id.* As Yergin observes, "One critic told a congressional committee . . . that CNOOC's bid was part of China's strategy for 'domination of energy markets and of the Western Pacific.'" *Id.* (quoting *UNOCAL Hearing*, *supra* note 39, at 6).

205. *Id.* ("Whatever the specifics of the takeover battle, the takeaway for the Chinese at the end of the political battle was that the United States itself was less hospitable to the

West, it was evidence that Chinese companies had changed.²⁰⁶ They were no longer focused on building their internal infrastructure and developing their petroleum practice at the local level; rather, they had the financial capacity to participate in the world market.²⁰⁷ People started to see CNOOC no longer as a regional state-owned company but as a global player with ambitions in the West.²⁰⁸

CNOOC's second effort to gain a foothold in U.S. oil and gas production in the Gulf of Mexico took place seven years later when it bought a large Canadian oil and gas company, Nexen.²⁰⁹ Instead of entering the U.S. market directly, by buying Nexen for \$15.1 billion, CNOOC acquired the Canadian interests in several fields located in the Gulf of Mexico.²¹⁰

Today, Nexen holds a 25% nonoperating working interest in Stampede, which is located 160 miles off the coast of Louisiana.²¹¹ Stampede is in 3500 feet of water and is expected to produce 300-350 million barrels of recoverable oil.²¹² Nexen also holds a 21% nonoperating working interest in Appomattox, located about eighty miles off the coast of Louisiana in over 7000 feet of water.²¹³ This field is operated by Shell Gulf of Mexico and is estimated to contain 700 million barrels of oil.²¹⁴ Appomattox is located a few miles from Nexen's other nonoperated fields in the Gulf of Mexico: Vicksburg, Gettysburg, and Rydberg.²¹⁵

openness toward foreign investment that it preached to others and that the Chinese companies should redouble their investment effort—but elsewhere.”).

206. *Id.*

207. *Id.* at 206-07.

208. *Id.* at 205 (“The world was shocked that a Chinese company could make this kind of bid,” said Fu Chengyu, at the time the CEO of CNOOC. “The West was saying that China is changing in terms of such things as building highways. But it was not paying attention to China itself and how China had changed.”).

209. Claudia Cattaneo, *China's CNOOC to Buy Nexen for \$15.1-Billion*, FIN. POST (July 23, 2012, 7:19 AM), <https://business.financialpost.com/commodities/energy/chinas-cnooc-to-buy-nexen-for-15-1-billion>.

210. *Id.*

211. *Operations: United States*, CNOOC INT'L LTD., <https://intl.cnooc ltd.com/en/operations/americas/united-states> (last visited Dec. 26, 2019).

212. Irina Slav, *China's Nexen Prepares to Pull Out of U.S. Gulf of Mexico*, OILPRICE.COM (Sept. 27, 2018, 11:00 AM), <https://oilprice.com/Latest-Energy-News/World-News/China-Nexen-Prepares-To-Pull-Out-Of-US-Gulf-Of-Mexico.html>.

213. *Id.*

214. *First Oil from Stampede*, CNOOC INT'L LTD., <https://intl.cnooc ltd.com/en/related-content/united-states/first-oil-from-stampede> (last visited Dec. 26, 2019).

215. *Id.*

In addition to the fields operated by Nexen directly, the Canadian-based company also manages exploration and working interests on behalf of CNOOC in four Statoil-operated offshore prospects in the Gulf of Mexico: Krakatoa, Logan, Cobra, and Tucker.²¹⁶ These fields are located close to the sea borderline with Mexico in the Alaminos Canyon.²¹⁷ For example, Cobra lies 132 miles from the nearest Texas shoreline in 7684 feet of water, and it is four blocks away from the borderline and one block away from Gotcha, Great White, and Trident—three fields that have been signaled out as containing possible transboundary fields.²¹⁸

On the Mexican side, CNOOC entered the deep waters of the Gulf aggressively in 2016.²¹⁹ During Mexico's first deepwater auction, CNOOC was awarded two fields after bidding aggressively.²²⁰ CNOOC's bids were done single-handedly and "were not only above the tender's average, but in the case of one block, it offered an additional royalty rate of 17.01 percent, 2.5 times higher than the second highest bidder and 5 times higher than the minimum rate demanded by the government."²²¹ In other words, CNOOC put everything on the table to secure that block. Only PEMEX, Mexico's state-owned company, presented a competing offer with an additional royalty of 6.65%.²²² Below is the official summary of the tendering process published by the Mexican National Hydrocarbons Commission showing the bid presented by CNOOC and the second behind it.²²³

216. *CNOOC Dives into Gulf of Mexico*, CHINA DAILY (Nov. 6, 2009), http://www.china.org.cn/business/2009-11/06/content_18838035.htm; Sanati, *supra* note 12.

217. Sanati, *supra* note 12.

218. *Id.*

219. Zheng Xin, *China Buys Two Blocks in Oil Auction*, CHINA DAILY, www.china.org.cn/business/2016-12/08/content_27606694.htm (last updated Dec. 8, 2016, 8:17 AM).

220. Mohar, *supra* note 4.

221. *Id.*

222. *China Buys Mexico Offshore Oil Rights*, CHINA ECON. REV. (Dec. 6, 2016), chinaeconomicreview.com/china-buys-mexico-offshore-oil-rights/.

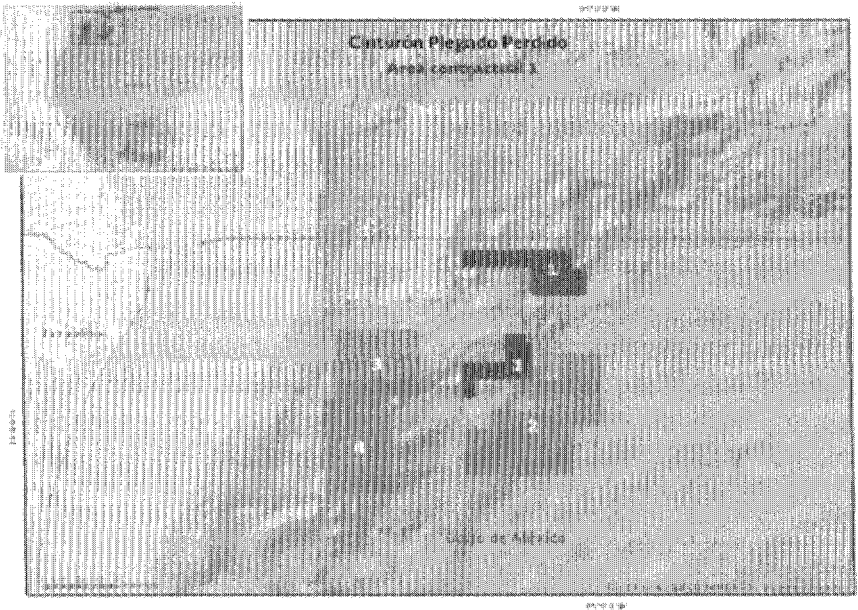
223. *Ronda 1-Licitacion 4*, COMISION NACIONAL DE HIDROCARBUROS 1, web.archive.org/web/20170610230203/https://rondasmexico.gob.mx/wp-content/uploads/2016/12/AR1-CPP.pdf (last visited Dec. 26, 2019).

Figure 1²²⁴

Resumen de resultados	Valor de la Reserva Adicional (bbl)	Factor de Inversión Adicional	Valor Presentado de la Oferta de inversión
China Offshore Oil Corporation E&P Mexico	17.01	1.5	100.476
Pemex Exploración y Producción	6.65	1.0	43.459
Statoil E&P México			No presenta
Statoil, BP y Total			No presenta
Murphy, Ophir, PC Cangali y Sierra			No presenta
Chevron, Pemex e Inpex			No presenta
PC Cangali y Sierra			No presenta
Total y ExxonMobil			No presenta
ENI y Lukoil			No presenta
Atlantic Rim y Shell			No presenta

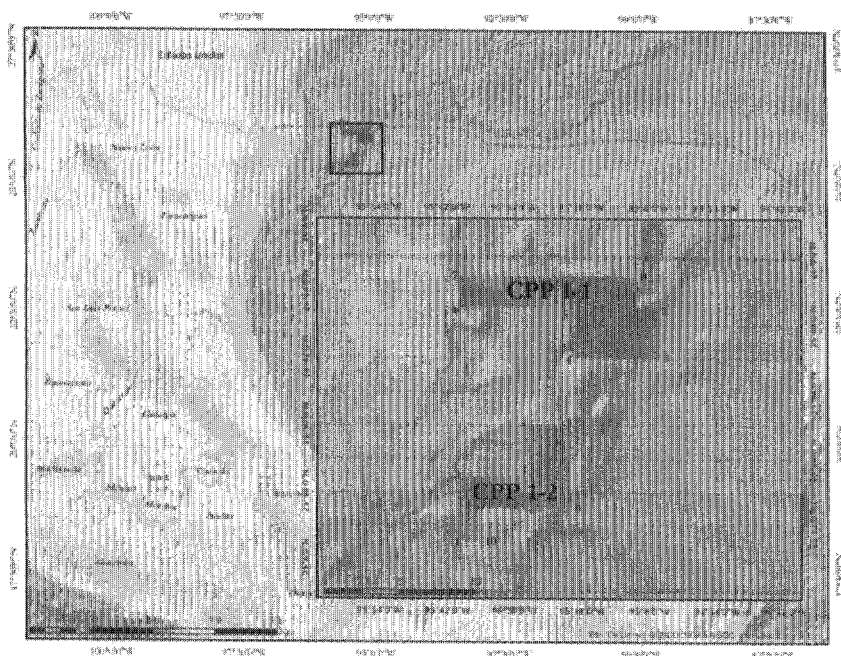
Why would CNOOC bet more than necessary for a block that all other major players perceived as an unattractive field? The answer lies in the location of the reservoir. The block awarded to CNOOC, A1 (see below), is right in the maritime border with the United States (see maps below).

Figure 2²²⁵



224. *Id.*

225. *Id.*

Figure 3²²⁶

In other words, CNOOC, as the single operator in the field, will have a front seat to the negotiations between Mexico and the United States that will determine the model contracts and safety and environmental regulations that will guide the exploitation of the field. CNOOC's effort to secure blocks near the border was confirmed a year later when, in the bidding round two of the Mexican energy reform, China again single-handedly offered an additional royalty of 11.45% for a borderline field, but lost against Shell and Pemex's joint offer of 15.02%²²⁷ and a cash payment of \$343 million.²²⁸ Shell outbid CNOOC because it is operating a field right across the border with the United States: Whale.²²⁹ According to information disclosed after the Mexican auction, Shell had recovered information on Whale that allowed it to calculate that the field will enable the international oil company to

226. *Id.*

227. Borda et al., *supra* note 10, at 2.

228. Ron Bousso & Marianna Parraga, *How Shell Hid a Whale Before Placing Mexican Oil Bet*, REUTERS, Mar. 2, 2018, available at <https://uk.reuters.com/article/us-ceraweeek-shell-reserves/how-shell-hid-a-whale-before-placing-mexican-oil-bet-idUKKCNI1GE1G2>.

229. *Id.*

recover 700 million barrels of oil, around half of Shell's 2017 oil production.²³⁰

IV. AN IMPERFECT UNION: U.S.-MEXICO TREATY ON TRANSBOUNDARY HYDROCARBONS EXPLOITATION

As discussed in the Introduction, the United States and Mexico signed an international treaty in 2012 that set principles for the safe and efficient exploitation of transboundary hydrocarbon resources in the Gulf of Mexico.²³¹ The 2012 Treaty faced several obstacles during its fourteen years of negotiation: Mexico's closed legislation to foreign investment in the energy sector, electoral cycles in both nations, U.S. exceptionalism regarding its relationship to the laws of the sea, the adoption of Dodd-Frank legislation in the United States impacting oil companies, and the Mexican state-owned company's (PEMEX) lack of sophistication, among others.²³² All of these challenges prevented the United States and Mexico from reaching an earlier deal and from adopting a comprehensive agreement.²³³ The three main factors that were unanswered and that have an impact on the United States and Mexico's practice on the development of transboundary resources—and for that matter, on the way customary international law on the subject evolves—are the following: the possibility for unilateral exploitation of the fields, the absence of a binding and clear dispute resolution mechanism, and the treatment of foreign investment in the development zones.

The following subparts will deal explicitly with these three factors and describe how they can set a precedent for the Chinese development of the South China Sea.

230. *Id.*

231. See 2012 Treaty, *supra* note 5.

232. Sanchez & McLaughlin, *supra* note 5, at 747-52.

233. For earlier work describing the challenges to reach an agreement, see Miriam Grunstein, *Unitized We Stand, Divided We Fall: A Mexican Response to Karla Urdaneta's Analysis of Transboundary Petroleum Reservoirs in the Deep Waters of the Gulf of Mexico*, 33 HOUS. J. INT'L L. 345 (2011); Karla Urdaneta, *Transboundary Petroleum Reservoirs: A Recommended Approach for the United States and Mexico in the Deepwaters of the Gulf of Mexico*, 32 HOUS. J. INT'L L. 333 (2010).

A. *Unitization à la Carte*

The principle of unitization is relatively simple to define.²³⁴ Unitization entails treating a hydrocarbon field that trespasses two blocks, or maritime boundaries, as a unit for its development.²³⁵ As described by a leading scholar in the field, "Unitization is the joint, coordinated operation of a petroleum reservoir by all the owners of rights in the separate tracts overlying the reservoir."²³⁶ The reason behind it is also relatively simple to grasp. If each side treats the reservoir differently, there is a risk of collapsing the field and affecting each other's property, or at the minimum of extracting the resources that belong to the neighboring operator. In a few words, unitization is a "method of producing oil and gas efficiently and fairly" for the benefit of both parties.²³⁷

Unitization as such is an international law principle that evolves from the customary norm of respecting the rights of neighboring nations to exploit their natural resources.²³⁸ Now, commentators have been reluctant to recognize that unitization is a customary norm that must be followed always.²³⁹ However, they acknowledge that states must exercise restraint from extracting resources that do not belong to

234. Jacqueline Lang Weaver & David F. Asmus, *Unitizing Oil and Gas Fields Around the World: A Comparative Analysis of National Laws and Private Contracts*, 28 HOUS. J. INT'L L. 3, 6 (2006).

235. *Id.* at 6-7.

236. *Id.* at 6.

237. *Id.* at 11.

238. G.A. Res. 1803 (XVII), at 15-16 (Dec. 14, 1962) ("The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace."); *see also* G.A. Res. 3281 (XXIX), art. 3 (Dec. 12, 1974) (calling for co-operation in order to achieve optimum use of resources between countries); G.A. Res. 3129 (XXVIII), at 49 (Dec. 13, 1973) ("Considers that it is necessary to ensure effective co-operation between countries through the establishment of adequate international standards for the conservation and harmonious exploitation of natural resources common to two or more States in the context of the normal relations existing between them Considers further that co-operation between countries sharing such natural resources and interested in their exploitation must be developed on the basis of a system of information and prior consultation within the framework of the normal relations existing between them.").

239. Cameron, *supra* note 185, at 560-61.

them, even if these are in areas where both nations have a contested right to exploit them.²⁴⁰

Putting it in colloquial terms, neighbors should respect each other's common oil fields and negotiate in good faith, but there is no clear rule on how to jointly exploit them.²⁴¹ Mexico and the United States accepted this international norm in the 2012 Treaty preamble, where they recognized the "principles that promote equitable and reasonable utilization of transboundary resources, and desir[e] to maximize the long term benefits from their exploitation, as well as to protect the resources of both Parties."²⁴² Moreover, they stated that the goal of the 2012 Treaty was to "establish a legal framework to achieve safe, efficient, equitable and environmentally responsible exploitation of transboundary hydrocarbon reservoirs that may exist along the maritime boundaries."²⁴³ In order to achieve these goals, the 2012 Treaty is "intended to encourage the establishment of cooperative arrangements based primarily on principles of unitization."²⁴⁴

Notwithstanding the recognition of each other's rights to develop the resources in accordance with international law, the United States and Mexico also deviated from international practice in substantial terms. First and foremost, the 2012 Treaty allows the operators to initiate production unilaterally if after a period of negotiation the interested parties cannot reach a unitization agreement.²⁴⁵

The negotiation process set up by the 2012 Treaty is less than adequate. It involves several deadlines with default rules of rejection and requires the consent of both governments' Executive Agencies and their licensees.²⁴⁶ If the governments do not approve the proposed unitization agreements within ninety days of being presented, the issue is referred to a Joint Commission that, for the reasons explained in

240. William T. Onorato, *Apportionment of an International Common Petroleum Deposit*, 26 INT'L & COMP. L.Q. 324, 328 (1977) ("[I]t is evident that unconsented, unilateral exploitation of an international common petroleum deposit by an interested State is unlawful under existing international law.").

241. Cameron, *supra* note 185, at 560–61.

242. 2012 Treaty, *supra* note 5, pmbl.; see Sanchez & McLaughlin, *supra* note 5, at 752–55.

243. 2012 Treaty, *supra* note 5, pmbl.

244. *Id.*

245. *Id.* art. 7(4) ("If no unitization agreement and associated Unit Operating Agreement has been approved within 90 days of submission of the issue to the Joint Commission, Exploitation of the Transboundary Reservoir may proceed pursuant to paragraph 5 of this Article.").

246. *Id.*

further detail below, is structurally deficient in resolving disputes.²⁴⁷ According to Article 7 of the 2012 Treaty, if no agreement has been approved by the governments or signed by the licensees after the Joint Commission fails to resolve the issue, “each Party may authorize its Licensee to proceed with Exploitation of the relevant Transboundary Reservoir subject to the determination of the recoverable Hydrocarbons.”²⁴⁸ In sum, the 2012 Treaty sets up a mechanism of negotiation that—far from ensuring Mexico and the United States develop their resources in an efficient, transparent, and effective way—configures a tortuous process with high chances for one of the parties to initiate production unilaterally. Ultimately, the 2012 Treaty only requires a licensee and/or a government authority to reject any proposal for 120 days.²⁴⁹ After that period, the licensee is entitled to develop the field unilaterally only subject to respecting the determination of production (the percentage of oil belonging to each side). The 2012 Treaty provision, as such, in principle defies customary international law that prevents parties from unilaterally exploiting transboundary resources.²⁵⁰

Second, the scope of the agreement’s obligation does not apply to any license awarded before the entry into force of the 2012 Treaty.²⁵¹ Article 1 explicitly excludes “any License existing as of the date of” the 2012 Treaty’s entry into force.²⁵² Since Mexico did not have any license in the maritime borderline at the time of the 2012 Treaty’s entry

247. *Id.* art. 4.

248. *Id.* art. 7(5) (“Should any Party or Licensee fail to sign a unitization agreement or Unit Operating Agreement, as applicable, approved by the Executive Agencies or the Joint Commission within 60 days of its approval, or should the Executive Agencies or the Joint Commission fail to approve a unitization agreement and an associated Unit Operating Agreement, each Party may authorize its Licensee to proceed with Exploitation of the relevant Transboundary Reservoir subject to the determination of the recoverable Hydrocarbons pursuant to paragraph 2 subparagraph b or paragraph 3 of this Article and any plan for joint management of the Transboundary Reservoir, including any provisions agreed governing redetermination and metering, as may be agreed between the Parties. Such plan may contain provisions for the resolution of disputes pursuant to Article 16. In the event of such Exploitation, Parties will exchange production data on a monthly basis.”).

249. *Id.* art. 7(4)-(5).

250. See Sanchez & McLaughlin, *supra* note 5, at 683.

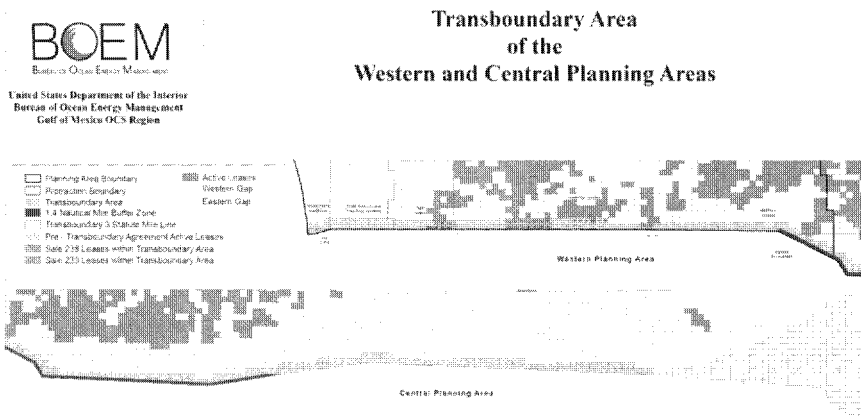
251. 2012 Treaty, *supra* note 5, art. 1 (“If any provision in this Agreement would require a Party to alter the terms of any License existing as of the date of the last notification provided under Article 22, such provision shall not apply in such case. Notwithstanding the foregoing, the Parties recognize that it is in their interest that such Licenses be subject to all terms of this Agreement, and shall undertake good faith efforts to bring those Licenses under this Agreement.”).

252. *Id.* art. 1.

into force, this provision means that the U.S. government would not commit itself to force existing licensees to adapt to the 2012 Treaty provisions, particularly the unitization obligation.²⁵³ The U.S. government only committed to “undertake good faith efforts to bring those Licenses under th[e] Agreement.”²⁵⁴ The Department of the Interior has recognized that there are licensed fields in the existing maritime borderline that have potential transboundary resources and that would not fall under the scope of the 2012 Treaty.²⁵⁵

Moreover, the U.S. Department of the Interior Bureau of Ocean Energy Management (BOEM) confirmed that the nine active leases of pre-Agreement licensees were offered the opportunity to “opt-in” to the terms of the Agreement but did not accept the offer.²⁵⁶ International oil companies such as Chevron, Shell, BP, Stone Energy, and Rocksource Gulf of Mexico hold these leases.²⁵⁷ Below is a map presented by a BOEM officer on the transboundary agreement showing the active leases that are subject to the 2012 Treaty and those that are not:

Figure 4²⁵⁸



253. See Sanchez & McLaughlin, *supra* note 5, at 684 (explaining how production areas have typically been far from maritime boundaries).

254. 2012 Treaty, *supra* note 5, art. 1.

255. Robert L. Sebastian, *Status of U.S. Policies: Leasing and Developing Hydrocarbons in Transboundary Areas*, BUREAU OCEAN ENERGY MGMT. 2, 5 (Feb. 12, 2015), <https://www.bakerinstitute.org/files/8821/>.

256. *Id.* at 11.

257. *Id.*

258. Sebastian, *supra* note 255, at 22.

It is precisely the excluded area that contains most of the current Perdido's oil production. Since coming onstream, that area has produced about 100 million barrels of oil equivalent (MMboe), and its estimated recoverable reserves are 500 MMboe.²⁵⁹

In addition to the pre-agreement leases, BOEM has awarded twenty-seven leases in blocks within the transboundary area (Sales 233 and 238).²⁶⁰ These included high bids of \$21,333,850 and \$28,059,734, respectively, by international oil companies such as Exxon Mobil, BP, BHP, and Stone Energy.²⁶¹

In conclusion, the 2012 Treaty recognizes international customary international law in its preamble, but in practice does not follow the spirit of the rule.²⁶² The 2012 Treaty sets up procedures to foster unitization but allows unilateral exploitation in case the negotiations fail.²⁶³ Moreover, it does not force existing licensees to implement the most important obligation of the Agreement. The 2012 Treaty as such is the first effort to exploit the resources efficiently for the benefit of both nations but leaves plenty of doors open for the parties to act unilaterally. The reluctance to force the parties to continue negotiations or bind themselves to a final decision is a recurrent theme of the 2012 Treaty obligations. The ultimate result of the Agreement is that the parties are forced to engage in conversations about unitization, and as such are mildly better off with the existing treaty than without one. However, they are not obligated to continue the negotiations indefinitely.²⁶⁴

If the United States would like to send a message to China that the resources in the South China Sea should be developed under international law, keeping the parties at the negotiation table until they find a way to exploit their resources jointly and equitably, the 2012 Treaty is not a good example. To the contrary, the U.S.-Mexico example incentivizes China to start producing fields in contested areas, even if it eventually is willing to sign an agreement to develop them jointly with its neighbors. If the rule to follow is the one set by the 2012 Treaty, China would either need to compensate its neighbors for the

259. Anne Leonard & Tom Liskey, *Drilling Picks Up Across the Perdido Foldbelt*, OFFSHORE MAG. (Jan. 13, 2016), <https://www.offshore-mag.com/drilling-completion/article/16754984/drilling-picks-up-across-the-perdido-foldbelt>.

260. Sebastian, *supra* note 255, at 18-19.

261. *Id.*

262. 2012 Treaty, *supra* note 5, pmbl., art. 4-5.

263. *Id.* art. 6, 7(5).

264. *See id.* art. 7(5).

extracted resources or modify the awarded concessions to reflect a unitization principle.

B. The Dispute Resolution Gap

Chapter five of the 2012 Treaty, entitled “Settlement of Disputes,” comes nowhere close to setting an efficient method to resolve the disputes arising from the 2012 Treaty’s implementation. Chapter five contains three methods available to resolve disputes arising from the 2012 Treaty: consultations/mediation, expert determination, and arbitration.²⁶⁵ Chapter five then divides the types of disputes into two categories: those related to the interpretation and implementation of the agreement, and those pertaining to expert determination.²⁶⁶ Each of these will be analyzed in the next subparts.

The 2012 Treaty also creates a Joint Commission in charge of “administering” the agreement.²⁶⁷ The Joint Commission serves as the initial interpreter of the 2012 Treaty, as the initial mediator for the allocation of production and as the body in charge of enacting dispute resolution procedures, including rules to appoint experts for the determination and allocation of production, and those related to the arbitration procedures.²⁶⁸ Moreover, the Joint Commission is empowered to establish working groups with experts and to seek advice from nongovernmental organizations and individuals to fulfill its mission.²⁶⁹

265. *Id.* art. 15, 16, 17.

266. *Id.* art. 15.

267. *Id.* art. 14(1).

268. *Id.* art. 8(3) (“If the Executive Agencies are unable to reach agreement on this initial allocation of production within 30 days from the date of the initiation of consultations in accordance with paragraph 1 of this Article, the matter shall be addressed by the Joint Commission.”); *id.* art. 14(5)–(6) (“The Joint Commission shall be the competent body to examine any dispute or other matter referred to it by either Executive Agency relating to the interpretation and implementation of this Agreement, or any unforeseen issues arising under this Agreement. . . . If the Joint Commission is unable within 60 days to resolve all differences concerning the allocation of production pursuant to Article 8, or the reallocation of production pursuant to Article 9, either Party may submit the dispute for Expert Determination.”); *id.* art. 16(1) (“The Joint Commission shall, within 180 days of the adoption of its rules of procedure, establish arrangements for the appointment of the expert and terms of engagement, including, in particular, provisions governing compensation and the protection of confidentiality.”); *id.* art. 17 (“If any dispute regarding the interpretation and implementation of this Agreement that is not subject to Expert Determination cannot be resolved by the Joint Commission or through consultations, either Party may submit the dispute to arbitration. The Joint Commission shall, within 180 days of the adoption of its rules of procedure, establish an arbitration mechanism for the implementation of this Article.”).

269. *Id.* art. 14(2)–(3).

Even though the creation of a Joint Commission was a positive step toward the implementation of the 2012 Treaty, the way it was created raises several questions about its ability to successfully exercise its functions.²⁷⁰ The first challenge that the Joint Commission faces is the fact that it is composed only of two individuals, each appointed by the government agencies representing the states in the 2012 Treaty.²⁷¹ The Joint Commission does not have any financial or technical autonomy to fulfill its mission.²⁷² The 2012 Treaty clarifies explicitly that each government shall support their representative with the assistance, including experts, that it deems necessary.²⁷³ As such, the Joint Commission operates more like a consultation mechanism between governments than an actual independent body that is in charge of implementing the treaty.

1. Expert Determination

The expert determination is solely connected to resolving disputes regarding the determination of the existence of a transboundary reservoir and the allocation/reallocation of production according to the transboundary reservoir.²⁷⁴ That is, if Mexico and the United States, through the Joint Commission, cannot agree on how much output should be allocated to each side of the border, the parties may submit the dispute to an expert who shall determine the allocation.²⁷⁵ According to Article 16, "Determinations of the expert shall be final and binding on the Parties."²⁷⁶

As such, regardless of the other type of disputes, both nations will be able to determine how much of the resources belong to each party. However, Article 16 is silent with regard to the methods of production, the unitization contract, the distribution of responsibilities, and liabilities among the operators and the government agencies.²⁷⁷ The expert determination is exclusively binding and final regarding the

270. For a detailed analysis of the U.S.-Mexico binational practice in creating commissions to resolve their disputes, see Sanchez & McLaughlin, *supra* note 5, at 726-33.

271. 2012 Treaty, *supra* note 5, art. 14(2) ("Each Party, through its Executive Agency, shall appoint one representative and one alternate representative to the Joint Commission. Each Party may provide assistance, including experts, to its representative as it deems necessary.").

272. *Id.* art. 14(1).

273. *Id.* art. 14(2).

274. *Id.* art. 14(6).

275. *Id.* art. 8(3), 14, 16.

276. *Id.* art. 16(9).

277. *Id.* ("Determinations of the expert shall be final and binding on the Parties.").

determination and allocation of production.²⁷⁸ All other mentioned issues are to be resolved through other dispute resolution mechanisms.

2. Consultation/Mediation

The initial method of resolving disputes on the interpretation and implementation of the Agreement is consultation.²⁷⁹ The governments “may initiate consultations through a written request to the other Party.”²⁸⁰ If the governments cannot resolve the disagreement within 120 days of the delivery of the request, “either Party may refer the disagreement to arbitration.”²⁸¹ However, Mexico and the United States may also agree to submit the dispute to nonbinding mediation by a neutral third party “in addition to, or in lieu of” the arbitral proceedings.²⁸² As such, the parties could be facing parallel proceedings to resolve the 2012 Treaty-related disputes: arbitration and nonbinding mediation. The only exceptions to this process are those disputes related to the determination and allocation of production.²⁸³ As mentioned above, issues related to the determination and distribution of production may be submitted to an expert if after 120 days the parties could not resolve their disagreements.²⁸⁴

3. Arbitration

What generally distinguishes international arbitration from other dispute resolution mechanisms is the fact that the arbitral process and the award are binding and final.²⁸⁵ Without these two elements, the arbitral process assimilates to mediation or conciliation, and the process will not qualify for the pro-enforcement safeguards provided by international treaties.²⁸⁶ As stated by a leading scholar in the

278. *Id.*

279. *Id.* art. 15(1) (“The Parties shall make every effort to resolve any disagreement relating to the interpretation and implementation of this Agreement through consultations as rapidly as possible. Either Party may initiate consultations through a written request to the other Party. Unless the Parties otherwise agree, the Parties shall consult within 20 days of delivery of the request.”).

280. *Id.*

281. *Id.* art. 15(2) (“If the Parties do not resolve a disagreement that is not subject to Expert Determination within 120 days of the delivery of the request for consultations, either Party may refer the disagreement to arbitration pursuant to Article 17 within 30 days.”).

282. *Id.* art. 15(3).

283. *Id.* art. 15(2).

284. *Id.*

285. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 204-05 (2d ed. 2014).

286. *Id.* at 204.

arbitration field, parties “should not treat arbitration as a possible future option, applicable only if the parties so agree after a dispute arises. . . . [A]rbitration clauses should (and usually do) provide that ‘all disputes *shall be finally resolved* by arbitration.’”²⁸⁷ That is not the case with Mexico’s and the United States’ treatment of the arbitration clause in the 2012 Treaty. The arbitration provision in the Agreement exemplifies a disposition that generates more ambiguity to the resolution of the dispute than actually helping the parties to reach a final binding solution.

Article 17 states that “[i]f any dispute regarding the interpretation and implementation of this Agreement that is not subject to Expert Determination cannot be resolved by the Joint Commission or through consultations, either Party *may* submit the dispute to arbitration.”²⁸⁸ Consequently, the arbitration clause has three considerable flaws: (1) it does not determine the procedure, rules, or the methods of appointment of the arbitrators; (2) the parties did not express their consent in the clause to make the proceeding binding; and (3) the provision does not treat the arbitral award as binding and final upon the Parties.²⁸⁹

Moreover, the 2012 Treaty leaves to the Joint Commission the decision on whether the award will be followed or not.²⁹⁰ It expressly establishes that “[t]he Joint Commission will have 30 days in which to consider the final recommendation in any arbitration.”²⁹¹ In case the Joint Commission disagrees with the recommendations and/or is “unable to resolve any remaining differences within that time, the dispute will be returned to the Parties.”²⁹² In other words, the arbitration award serves as a recommendation to the Joint Commission on how to

287. *Id.* at 204-05 (quoting GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS; DRAFTING AND ENFORCING (5th ed. 2016)).

288. 2012 Treaty, *supra* note 5, art. 17 (emphasis added).

289. Sanchez & McLaughlin, *supra* note 5, at 762.

290. 2012 Treaty, *supra* note 5, art. 14(7).

291. *Id.*

292. *Id.* (“If the Joint Commission is unable within 60 days to resolve all differences concerning any dispute referred to it by the Executive Agencies relating to the interpretation and implementation of this Agreement that is not addressed in paragraph 6 of this Article [expert determination] or referred to it under paragraphs 4 or 5 of Article 6 [the approval of unitization agreements] or paragraph 4 of Article 7 [exploitation of the transboundary reservoir in case no unitization agreement is approved or signed], either Party may resort to the dispute settlement provisions in Articles 15 or 17. The Joint Commission will have 30 days in which to consider the final recommendation in any arbitration instituted pursuant to Article 17. If the Joint Commission is unable to resolve any remaining differences within that time, the dispute will be returned to the Parties.”).

resolve the dispute, and it is up to the commissioners to consider it or send their differences back to the government representatives.

When compared to other transboundary resources treaties, the 2012 Treaty's atypical dispute resolution mechanism becomes clearer. For example, instead of the "may submit to arbitration" language contained in the 2012 Treaty,²⁹³ the practice is to include language that makes the proceeding binding. The Iceland-Norway Agreement of 2008, the Norway-UK Frigg Agreement of 1978, and the Australia-Indonesia Timor Gap Treaty make arbitration mandatory by stating that the dispute "shall be submitted" to arbitration ("referred to" in the case of the Netherlands-Germany Treaty and the Korea-Japan) if the parties cannot reach an agreement.²⁹⁴ Furthermore, the practice in other treaties is to ensure that the award is final and binding: "[a]n award shall be final and binding on Australia and Timor-Leste";²⁹⁵ "[t]he decisions of the tribunal shall be binding";²⁹⁶ or "[t]he Parties shall abide by any award made by the arbitration board under this article."²⁹⁷ There is no option for the parties to "consider" the recommendations of the arbitration panel as the 2012 Treaty allows in Article 14(7).²⁹⁸

C. *Foreign Direct Investment Protection and Challenges at the Borderline*

Critical questions on the application of foreign investment protection mechanisms are at play in the implementation of the 2012

293. *Id.* art. 15(2).

294. Agreement Concerning Transboundary Hydrocarbon Deposits, Nor.-Ice., art. 5, Nov. 3, 2008, 2888 U.N.T.S. 13, 17 [hereinafter Iceland-Norway Treaty]; Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Austl.-Indon., art. 30(2), Dec. 11, 1989, 1654 U.N.T.S. 105, 139 [hereinafter Timor Gap Treaty]; Agreement Relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas Therefrom to the United Kingdom, U.K.-Nor., art. 28(2), May 10, 1976, 1098 U.N.T.S. 3, 13; Agreement Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Japan-S. Kor., art. XXVI(2), Jan. 30, 1974, 1225 U.N.T.S. 113, 122 [hereinafter Japan-Korea Treaty]; Treaty Concerning the Delimitation of the Continental Shelf Under the North Sea, Neth.-Ger., art. 5(2), Jan. 28, 1971, 857 U.N.T.S. 131, 144 [hereinafter Netherlands-Germany Treaty].

295. Agreement Relating to the Unitisation of the Sunrise Troubadour Fields, Austl.-Timor-Leste, Annex IV(j), Mar. 6, 2003, 2483 U.N.T.S. 317, 338.

296. Iceland-Norway Treaty, *supra* note 294, art. 5 ("The decisions of the tribunal shall be binding upon the Parties."); *see also* Timor Gap Treaty, *supra* note 294, art. 12(5) ("The decision of a majority of the arbitrators shall be final and binding . . ."); Netherlands-Germany Treaty, *supra* note 294, art. 5(6) ("The decision [of the tribunal] shall be binding.").

297. Japan-Korea Treaty, *supra* note 294, art. XXVI(5) ("The Parties shall abide by any award made by the arbitration board under this article.").

298. 2012 Treaty, *supra* note 5, art. 14(7).

Treaty. The 2012 Treaty is silent regarding the international protection that the recipients of licenses located at the border, or that the unitization agreements, will have.²⁹⁹ There is no reassurance that a global oil company operating at the borderline will be protected by a BIT or investment chapter in a free trade agreement such as NAFTA.

In the case at hand, the United States and China do not have a BIT, but since 2009, Mexico does have one with China.³⁰⁰ Article 1 of the Mexico-China Agreement explicitly states that “contracts involving the presence of an investor’s property in the territory of the other Contracting Party, including turnkey or construction contracts, or concessions” are covered by the agreement.³⁰¹ The territory protected by the agreement includes “the maritime areas adjacent to [the Mexican] coast, *i.e.* territorial sea, the exclusive economic zone and the continental shelf, to the extent to which the United Mexican States may exercise sovereign rights or jurisdiction in those areas according to international law.”³⁰²

Would this disposition imply that the Agreement will protect the investments made by Chinese companies in the unitized area? Which government would be liable for the damages caused to the Chinese investments in case the United States decides to allow the U.S. licensee to initiate unilateral exploitations of the field or chooses to impose onerous regulation in the area? The existing Mexican licenses in deepwater fields do provide safeguards to foreign investors under international agreements; the United States does not.³⁰³

299. *See id.* (failing to address international protections concerning license holders at borders).

300. *See* Agreement on the Promotion and Reciprocal Protection of Investments, Mex.-China, July 11, 2008, 2626 U.N.T.S. 3.

301. *Id.* art. 1 (“[I]nvestment’ means the assets owned or controlled by investors of a Contracting Party and acquired in accordance with the laws and regulations of the other Contracting Party, listed below . . . interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under . . . contracts involving the presence of an investor’s property in the territory of the other Contracting Party, including turnkey or construction contracts, or concessions, or . . . contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.”).

302. *Id.* (“[I]n respect of the United Mexican States, the territory of the United Mexican States including the maritime areas adjacent to its coast, *i.e.* territorial sea, the exclusive economic zone and the continental shelf, to the extent to which the United Mexican States may exercise sovereign rights or jurisdiction in those areas according to international law.”).

303. Guillermo José García Sánchez, *The Fine Print of the Mexican Energy Reform* 13 (May 2018) (working paper) (on file at the Wilson Center at Rice University), https://www.wilsoncenter.org/sites/default/files/the_fine_print_of_the_mexican_energy_reform.pdf.

For example, the license awarded to CNOOC in the latest deepwater bidding round specifies that the licensee “may initiate a proceeding before an international tribunal . . . exclusively to determine the existence of compensatory damages and lost profits and, depending on the case, its monetary quantification, that emerges as a consequence of an administrative rescission that is ruled as groundless by the Federal Tribunals.”³⁰⁴ The Mexican Hydrocarbons Law and the concession specify the grounds for an administrative rescission, which must be challenged in Mexican federal tribunals, but the investor may bring claims against Mexico for the quantification of the damages and any other claim not related to an administrative rescission.³⁰⁵ Such claims include modification of existing legislation by a new government that affects the concessions directly and forces the licensees to renegotiate its terms.³⁰⁶ International BITs force Mexico to provide the licensees with “fair and equitable treatment (NAFTA Article 1105, or China-Mexico BIT Article 5).”³⁰⁷ These claims are protected since the license recognizes that CNOOC “will enjoy all the rights recognized in international treaties signed by the [Mexican] State.”³⁰⁸

In the same vein, the Mexican hydrocarbons law forces international companies to constitute a subsidiary in Mexico to participate in the energy sector.³⁰⁹ Hence, the companies operating at the borderline are, for legal purposes, Mexican companies and consequently may argue that the agreements between Mexico and the United States that protect foreign investors, such as NAFTA Chapter XI, benefit them. All of these questions are not resolved in the 2012 Treaty and can potentially generate disagreements among the companies and the governments that will be subject to the less than ideal dispute resolution mechanism of the 2012 Treaty.

As discussed in this Article, the United States and China are in the process of defining the contours of these issues in the international investment regime. In many ways, China is emulating the approach taken by the United States during the 1990s, ensuring maximum protection to its investors abroad—including investments made by

304. CNOOC-Mexico Contract, *supra* note 35 (author’s translation); *see also* Sanchez, *supra* note 303, at 13 (discussing terms of Mexico’s contract with CNOOC).

305. Sanchez, *supra* note 303, at 12-13.

306. *Id.* at 14.

307. *Id.*

308. CNOOC-Mexico Contract, *supra* note 35, at 66.

309. *Oil Regulation: Mexico*, GETTING DEAL THROUGH (June 2019), gettingthedealthrough.com/area/24/jurisdiction/16/oil-regulation-mexico/.

state-owned companies—whereas the United States today is in the process of giving more power to the governments to regulate foreign investment and to affect their expectations in light of security and economic concerns. The regulation adopted by Washington and Mexico City on the protection of foreign investment in the borderline area will impact Chinese investment in the Gulf and could be subject to international claims.³¹⁰

V. CONCLUSION

In his book *On China*, Henry Kissinger analyzed the prospect of U.S.-China military confrontations.³¹¹ He insisted that we should avoid comparing the rise of China to Germany's expansion and the threat it posed to British global hegemony in the decades before World War I.³¹² To the contrary, he concluded that Sino-American relations "need not—and should not—be a zero-sum game."³¹³ To Kissinger, China needs the United States as much as the United States needs China to continue sustainable growth and maintain national unity.³¹⁴ To Kissinger:

The United States bears the responsibility to retain its competitiveness and its world role. It should do this for its own traditional convictions, rather than as a contest with China. Building competitiveness is a largely American project, which we should not ask China to solve for us. China, fulfilling its own interpretation of its national destiny, will continue to develop its economy and pursue a broad range of interests in Asia and beyond. This is not a prospect that dictates the confrontations that led to the First World War. It suggests an evolution in many aspects of which China and the United States cooperate as much as they compete.³¹⁵

I can only agree with Henry Kissinger's conclusion. However, one element that is missing in his analysis is that legal regimes help to cement competitive cooperation.³¹⁶ Just like in the domestic legal system, where two parties can compete with each other and, through the use of the legal system, advance their goals without violently confronting each other, so too can nations compete without entering into armed conflicts.

310. See Sanchez & McLaughlin, *supra* note 5, at 758-59.

311. KISSINGER, *supra* note 16, at 523.

312. *Id.*

313. *Id.*

314. *Id.* at 525-26.

315. *Id.*

316. Wu, *supra* note 16, at 262-63.

Chinese emulation of the rules set up by America and its influence on international institutions is not a threat to Western values, but an affirmation that law helps to maintain conflicting relationships. One of the main advantages of the rule of law is that it keeps actors with different interests and points of view engaged in a nonviolent process. Disparate parties can go to court to resolve their differences; if their relationships change, they can renegotiate contracts; if their interests differ, they can amend legislation and constitutions. Even if some actors lose in the process, as long as they believe that down the road the legal system can also be used to their advantage, peace and order will remain.³¹⁷ Parties will use the legal toolbox to interact, as opposed to resorting to violence and starting an armed conflict in the case of states.

I do not ignore the fact that law is a tool better used by powerful interests.³¹⁸ It is a tool that tends to benefit the forceful party the most.³¹⁹ But when an incoming strong player is using the rules set up by the mighty, it allows the major players to engage in a peaceful process. The legal process will enable parties with competing interests to use the law to their advantage without resorting into violence. China and the United States are engaging in this game in different areas of international law, particularly in the trade and investment systems.³²⁰ The legal regime of transboundary hydrocarbons is just one more area where this dynamic is taking place.

As this Article demarcated, the Chinese state-owned companies have strategically positioned themselves in different borderlines around the world to be at the table of the negotiations taking place among nations on the rules to develop transboundary hydrocarbon deposits. The Chinese companies present model unitization agreements to governments involved, draft dispute resolution clauses, and engage in dialogue with regulators to set up the rules that regulate the offshore practice. They are engaging with the rules in areas where two developed nations have a long-standing practice of cooperation (United Kingdom and Norway in the North Sea), in areas where the law is still in the process of development (the Cameroon-Nigeria maritime borderline), and in areas where there is a disparity in the negotiation

317. *See id.* at 263-64.

318. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 95-96 (1974).

319. *Id.* at 121-22.

320. *See Wu, supra* note 16, at 262-64.

strength of the governments involved (the U.S.-Mexico borderline in the Gulf of Mexico). The character of the nations involved varies in each jurisdiction, but the trend is the same: the Chinese state-owned companies have a say in the game and will use what they learn in the process to their advantage in the South China Sea.

To be clear, my argument is not that Chinese emulation of Western rules and practices in the development of oil and gas law is a clear threat to U.S. national security. The presence of Chinese investment in the legal regime of transboundary fields is an effort to learn the existing rules, master them, and eventually modify them to their advantage in the South China Sea. This strategy only becomes a threat if Western nations allow unilateral practices to take place within their borders; if they allow Western companies to bully governments with less developed regulators in the sector to implement one-sided extraction contracts; and if the United States is not careful in setting up rules with Mexico where shared safe, efficient, and effective methods are employed for the benefit of all parties involved. Any practice by the United States will set up a precedent in favor of Chinese interests.³²¹ The system is being tested. Either Western nations allow the most influential party to take advantage of the development of the fields, or they set up a system of control over the forceful party. Whatever they decide, the Chinese are taking note and will try to employ it to their advantage.

321. Sanchez & McLaughlin, *supra* note 5, at 745-46.